TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 250.

ARCHIBALD HOLLERBACH AND SAMUEL L. MAY, PARTNERS, DOING BUSINESS AS HOLLERBACH & MAY, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED APRIL 29, 1912.

(23,191)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 27, 1913.

1 In the Court of Claims.

No. 29952.

ARCHIBALD HOLLERBACH and SAMUEL L. MAY, Partners, Doing Business as HOLLERBACH & MAY,

v.

THE UNITED STATES.

I. *Note of Filing of Petition.*

On the 11th day of January, 1907, the claimants filed their original petition. On the 18th day of April, 1910, by leave of the court, they filed an amended petition as follows:

II. *Amended Petition.*

In the Court of Claims.

No. 29952.

ARCHIBALD HOLLERBACH and SAMUEL L. MAY, Partners, Doing Business as HOLLERBACH & MAY,

v.

THE UNITED STATES.

Amended Petition.

[Filed April 18, 1910.]

[Original Petition Filed January 11, 1907.]

To the Honorable the Court of Claims:

The claimants, Archibald Hollerbach and Samuel L. May, partners doing business as Hollerbach & May, respectfully represent:

The claimants, as partners, entered into a contract on the 23d day of July, in the year 1902, with the United States, represented by Major E. H. Ruffner, Corps of Engineers, United States Army, for repairs to Dam No. 1, Green River, Kentucky, in accordance with certain specifications annexed to said contract. Said contract and specifications are fully set forth in the record of this case, pp. 7 to 21, and are made a part hereof.

In the course of the performance of said contract, certain breaches of the contract occurred on the part of the United States, giving rise to a claim against the United States, more particularly stated as follows:

1. Deficiency in Earth Excavation—Item I.

By paragraph 73 of said specifications, it was provided as follows:

"73. Approximate Quantities.—Owing to the nature of the work, it is impossible to estimate with accuracy the quantities required under each item. The approximate quantities given below will be used in canvassing the bids, but bidders must so fix their prices as to permit increase or diminution in the quantities required, within the limits stated for each; and it is understood and agreed that such increase or diminution, whether resulting from error in estimate, modification of plans, or condition of old structure shall be considered as increasing or diminishing the cost of the work, and shall form no basis for any claim against the United States.

"Repairs to Dam No. 1, Green River, Ky.

	Approximate quantities cubic yards.	May be increased per cent.	May be decreased per cent.
Concrete	5,953	20	20
Earth excavation	3,970	20	20
Crib excavation	4,693	20	20

"The United States will not be responsible for accidents or injuries to the contractor's employés, plant or materials, nor for any damage done by or to them from any source or cause."

By said paragraph there should have been furnished to the claimants 3,970 cubic yards of earth excavation with a permissible decrease of 20 per cent, making the minimum quantity of earth excavation allowable under the contract 3,176 cubic yards. Instead thereof, however, only 1,183.55 cubic yards of earth excavation were allowed, leaving a deficiency of earth excavation of 1,992.45 cubic yards. The price stipulated in the contract for such excavation was 55 cents a cubic yard. It would have cost the claimants only 10 cents a cubic yard to excavate said 1,992.45 cubic yards at the place at which the same was, according to the specifications, to be excavated.

The profits lost to the claimants, to which they were entitled under said contract, the same being lost by reason of the failure of the defendants to furnish the minimum amount of excavation provided by the contract was forty-five cents a cubic yard upon the deficiency aforesaid, that is:

1,992.45 yards at 45 cents..... $896.60.

2. Breach of Warranty—Items II, III, and IV.

It is further stated in paragraph 33 of the specifications as follows:

"The dam is now backed for about 50 feet with broken stone, saw dust and sediment to a height of within two or three feet of the crest, and it is expected that a cofferdam can be constructed with this stone,

after which it can be backed with saw dust or other material. The excavation behind the dam will be required to go to the bottom, and it is thought that a slope of one horizontal to 1.2 vertical will give ample room."

Said provision is a warranty by the United States of the fact that the dam was backed as therein stated. The conditions actually existing were found to be entirely different from those so represented and guaranteed by the United States.

The dam was not backed with broken stone, saw dust and sediment. At a height of about two feet from the crest, the dam was backed by a very soft, slushy sediment to a depth of five to seven feet, of which 1,183.55 yards were removed and paid for as earth excavation.

Below this sediment to the bottom of the required excavation the dam was backed for about sixty feet by cribwork, consisting of sound logs filled with large stones, of which 633.50 cubic yards were removed from the back of the dam and paid for as crib excavation.

4 Item II. Cost of Securing Material.

If the dam had been backed for fifty feet with broken stone, saw dust and sediment to a height of within two or three feet of the crest, this material could have been easily and inexpensively used for the construction of the cofferdam, a necessary part of the work to be done by the claimants. The material found could be so used only to a very limited extent.

By reason of the dam not being so backed the claimants were obliged to go elsewhere for materials for the construction of the cofferdam at an expense to them of $2,184.08.

Items III, IV. Additional Cost of Excavation.

If the dam had been backed for fifty feet with broken stone, saw dust and sediment to a height of within two or three feet of the crest, the actual cost to the claimants of removing it, with the machinery and appliances then on the works, would not have been more than ten cents a cubic yard.

By reason of the dam not being so backed, the actual loss to the claimants on the excavation done and paid for was as follows:

Item III. 1,183.55 cubic yards of sediment paid for as earth excavation at 55 cents a yard.

Actual cost of labor and fuel in taking this material out by hand and in the wet, 35 cents a cubic yard.....	$414 24
Cost of labor and fuel, had conditions been as represented, 10 cents a cubic yard.....	118 35
Balance due	$295 89

5	Item IV. Cost of excavating 633.50 cubic yards of crib	$6,334 32
	Amount received for such excavation at the contract price for crib excavation 80 cents a yard	506 80
	Excess of cost over amount received	$5,827 52

3. Cost of Inspection and Superintendence—Item V.

The claimants, with the approval of the officer in charge as engineer of the United States, did not begin work prior to the year 1903 for the reason that they were at the time engaged on other work for the United States in charge of the same engineer officer, which was regarded by said engineer officer, as well as by themselves, as more important to do than the work covered by this contract, and it was desired that they complete the same before beginning this work. They were in readiness to start the work under this contract at any time after the first of January, 1903, but high water prevented them from starting until the first of September, 1903. They started on or about said first day of September, 1903, and worked continuously until the 9th of October, when the water stopped the work for ten days until October 19, after which they worked until the first of November, 1903, but were unable to do any more during the season of 1903, or until the first of September, 1904. They then resumed work and worked during the months of September, October and November, 1904.

During all this time, the work was prosecuted with due diligence by the claimants.

If the dam had been backed for about fifty feet with broken stone, saw dust and sediment to a height of within two or three feet of the crest, the claimants beginning the work as aforesaid, and
6 allowing for all delays on account of high water, could and would have finished the work by November, 1903. The failure to complete it by that time was due to the much greater length of time required to remove by hand the crib work found in the backing of the dam than would have been required to remove broken stone, saw dust and sediment by machinery as well as to the time required for bringing material from a distance for the cofferdam.

Deduction was made from the amount found due the claimants of expenses of inspection and superintendence by the United States as follows:

September, 1903	$200 00
October, 1903	200 00
September, 1904	100 00
October, 1904	150 00
November, 1904	150 00
Total	$800 00

Had the work been done in the seasons of 1902 and 1903, as provided by the contract, the same expenses for inspection and superintendence would have been required.

4. Protests and Claims.

The claimants made verbal and written protests and claims during and immediately after the conclusion of the contract as to all the items of claim herein set forth.

This claim was presented to the Chief of Engineers of the Army who, officially and in writing, recognized that there was a breach of contract on the part of the United States in the large deficiency of earth excavation as stated in paragraph 1 of this petition, but refused to pay the same because the Comptroller of the Treasury had decided that such a claim was for the courts and not for the executive departments to settle.

7 Conclusion.

The claimants therefore claim as follows:

Item I. Loss of profits by deficiency in earth excavation furnished	$896 60
Item II. Cost of obtaining material to supply deficiency at site	2,184 08
Item III. Excess of cost of excavating sediment over excavation of material guaranteed by paragraph 33	295 89
Item IV. Excess of cost of excavating crib in the backing over excavation of material guaranteed by paragraph 33	5,827 52
Item V. Deduction for inspection	800 00
Total	$10,004 09

No assignment or transfer of this claim, or of any part thereof or interest therein, has been made; and the claimants are justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. The claimants are citizens of the United States. And the claimants ask judgment for ten thousand and four dollars and nine cents ($10,004.09).

KING & KING,
Attorneys for Claimants.

STATE OF INDIANA,
County of Vanderburg, ss:

Samuel L. May, being duly sworn, deposes and says: I am one of the claimants in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge and belief.

SAMUEL L. MAY.

Subscribed and sworn to before me this 9th day of April, 1910.
CLINTON F. ROSE,
Notary Public.

My commission expires May 19, 1912.

8 Court of Claims of the United States.

No. 29952.

ARCHIBALD HOLLERBACH and SAMUEL L. MAY, Partners, Doing Business as HOLLERBACH & MAY,
v.
THE UNITED STATES.

Specifications.

General Instructions for Bidders.

1. The attention of bidders is especially invited to the acts of Congress approved February 26, 1885, and February 23, 1887, as printed in vol. 23, page 332, and vol. 24, page 414, United States Statutes at Large, which prohibit the importation of foreigners and aliens, under contract or agreement, to perform labor in the United States or Territories, or the District of Columbia.

2. Preference will be given to articles or materials of domestic production, conditions of quality and price being equal, including in the price of foreign articles the duty thereon.

3. No proposal will be considered unless accompanied by a guaranty, which should be in manner and form as directed in these instructions.

4. All bids and guaranties must be made in triplicate, upon printed forms to be obtained at this office.

9 5. The guaranty attached to each copy of the bid must be signed by an authorized surety company, or by two responsible guarantors, to be certified as good and sufficient guarantors by a judge or clerk of a United States court, United States district attorney, United States commissioner, or judge or clerk of a State court of record, with the seal of said court attached.

6. A firm, as such, will not be accepted as surety, nor a partner for a copartner or firm of which he is a member. Stockholders who are not officers of a corporation may be accepted as sureties for such corporation. Sureties, if individuals, must be citizens of the United States.

7. When the principal, a guarantor, or a surety, is an individual, his signature to a guaranty or bond shall have affixed to it an adhesive seal. Corporate seals will be affixed by corporations, whether principals or sureties. All signatures to proposals, guaranties, contracts, and bonds should be written out in full, and each signature to guaranties, contracts, and bonds should be attested by at least one witness, and, when practicable, by a separate witness to each signature.

8. Each guarantor will justify in the sum of ten thousand dollars

($10,000.00). The liability of the guarantors and bidder is determined by the act of March 3, 1883, 22 Statutes, 487, chap. 120, and is expressed in the guaranty attached to the bid.

9. A proposal by a person who affixes to his signature the word "president," "secretary," "agent," or other designation, without disclosing his principal, is the proposal of the individual. That by a corporation should be signed with the name of the corporation, followed by the signature of the president, secretary, or other person authorized to bind it in the matter, who should file evidence of his authority to do so. That by a firm should be signed with the firm name, either by a member thereof or by its agent, giving the names of all members of the firm. Any one signing the proposal as the agent of another, or others, must file with it legal evidence of his authority to do so.

10. The place of residence of every bidder, and post-office address, with county and State, must be given after the signature.

11. All prices must be written as well as expressed in figures.

12. One copy each of the advertisement, the instructions for bidders, and the specifications, all of which can be obtained at this office on application by mail or in person, must be securely attached to each copy of the proposal and be considered as comprising a part of it.

13. Proposals must be prepared without assistance from any person employed in or belonging to the military service of the United States or employed under this office.

14. No bidder will be informed, directly or indirectly, of the name of any person intending to bid or not to bid or to whom information in respect to proposals may have been given.

15. All blank spaces in the proposal and bond must be filled in, and no change shall be made in the phraseology of the proposal or addition to the items mentioned therein. Any conditions, limitations, or provisos attached to the proposals will be liable to render them informal and cause their rejection.

16. Alterations by erasure or interlineation must be explained or noted in the proposal over the signature of the bidder.

17. If a bidder wishes to withdraw his proposal he may do so before the time fixed for the opening, without prejudice to himself, by communicating his purpose in writing to the officer who holds it, and, when reached, it shall be handed to him or his authorized agent unread.

18. No bids received after the time set for opening of proposals will be considered.

19. The proposals and guaranties must be placed in a sealed envelope marked "Proposal for Repairs to Dam No. 1, Green River, Ky., to be opened July 5, 1902," and inclosed in another sealed envelope addressed to Major E. H. Ruffner, P. O. Box 72, Louisville, Ky., but otherwise unmarked. It is suggested that the inner envelope be sealed with sealing wax.

20. It is understood and agreed that the quantities given are approximate only, and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders, or their authorized agents, are expected to exam-

ine the maps and drawings in this office, which are open to their inspection, to visit the locality of the work, and to make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies.

21. The United States reserves the right to reject any and all bids and to waive any informality in the bids received; also to disregard the bid of any failing bidder or contractor known as such to the Engineer Department, or any bid which is palpably unbalanced or obviously below what the work can be done for, or the bid of any bidder who shall fail to produce, when called upon, evidence satisfactory to the engineer officer in charge of the said bidder's ability to do the contemplated work within the required time, including his control of the necessary means and equipment. The failure of a bidder to make satisfactory progress or to complete on time similar work under previous contracts with the United States will be duly considered in canvassing bids, and may be a valid cause for the rejection of his proposal. Reasonable grounds for supposing that any bidder is interested in more than one bid for the same item may cause the rejection of all bids in which he is interested.

22. The bidder to whom award is made will be required to enter into written contract with the United States, with good and approved security, in an amount of ten thousand dollars ($10,000.00), within ten (10) days after being notified of the acceptance of his proposal. The contract which the bidder and guarantors promise to enter into shall be, in its general provisions, in the form adopted and in general use by the Engineer Department of the Army, blank forms of which can be inspected at this office, and will be furnished, if desired, to parties proposing to put in bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract.

23. The sureties, if individuals, are to make and subscribe affidavits of justification on the back of the bond to the contract, and they must justify in amounts which shall aggregate double the amount of the penal sum named in the bond.

24. Bidders are invited to be present at the opening of the bids.

11 General Conditions.

25. A copy of the advertisement and of the specifications, instructions, and conditions will be attached to the contract and form a part of it.

26. The contractor should, within ten days from the award of the contract, furnish the office with the post-office address to which communications should be sent.

27. Transfers of contracts, or of interest in contracts, are prohibited by law.

28. The contractor will not be allowed to take advantage of any error or omission in these specifications, as full instructions will always be given should such error or omission be discovered.

29. The decision of the engineer officer in charge as to quality and quantity shall be final.

30. Payment will be made as provided in paragraph 38 of these specifications.

31. Unless extraordinary and unforeseeable conditions supervene the time allowed in these specifications for the completion of the contract to be entered into is considered sufficient for such completion by a contractor having the necessary plant, capital, and experience. If the work is not completed within the period stipulated in the contract, the engineer officer in charge may, with the prior sanction of the Chief of Engineers, waive the time limit and permit the contractor to finish the work within a reasonable period, to be determined by the said engineer officer in charge. Should the original time limit be thus waived all expenses for inspection and superintendence and other actual losses and damages to the United States due to the delay beyond the time originally set for completion shall be determined by the said engineer officer in charge and deducted from any payments due or to become due the contractor: Provided, however, That the party of the first part may, with the prior sanction of the Chief Engineers, waive for a reasonable period the time limit originally set for completion and remit the charges for expenses of superintendence and inspection for so much time as in the judgment of the said engineer officer in charge may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements or by epidemics, local or State quarantine restrictions, or other unforeseeable cause of delay arising through no fault of the contractor and which prevented him from commencing or completing the work or delivering the materials within the period required by the contract: Provided further, That nothing in these specifications shall affect the power of the party of the first part to annul the contract as provided in the form of contract adopted and in use by the Engineer Department of the Army.

32. The contractor will be required to hold the United States harmless against all claims for the use of any patented article, process, or appliance in connection with the contract herein contemplated.

Special Conditions.

33. Work to be done.—The work contemplated under these specifications in the repair of Dam No. 1, Green River, Ky., with concrete. The present dam, a wooden crib structure, is 528 feet
12 long between abutments and about 52 feet wide at its base. The expected depth of concrete work is shown on the blueprints, but it may be made greater, as the condition of the old timber may render it necessary. The work shall be carried out in sections, generally from 50 to 100 feet long, and no more of the old work shall be torn out than can be rebuilt in a few days in case of necessity. All the exterior surfaces of the concrete shall be faced with the facing described in paragraph 59, which shall be placed before the concrete below has set, and shall be smoothly finished off. The dam is now backed for about 50 feet with broken stone, sawdust,

and sediment to a height of within two or three feet of the crest, and it is expected that a cofferdam can be constructed with this stone, after which it can be backed with sawdust or other material. The excavation behind the dam will be required to go to the bottom, and it is thought that a slope of 1 horizontal to 1.2 vertical will give ample room.

34. General requirements.—The old work is to be torn out to such a depth as shall be decided by the engineer during the progress of the work, depending upon the condition of the timber encountered, and to be replaced by concrete. The filling is also to be taken out to the same depth, and such of the stone as is good may be saved and used in the concrete refilling; the balance of the filling and the timber shall be deposited in places to be designated by the engineer in the neighborhood of the work. All old timber taken out must be piled on the river bank in such shape as to dry out; it must not be dumped into the river. If desired, the contractor may dispose of all or any portion of it to parties who will take it away.

35. Classification.—All material, whether timber or filling, ordered to be taken out of the old dam will be classified as "Crib excavation;" all excavation of the filling behind the dam will be classified as "Earth excavation;" all concrete work, including facing, will be classified as "Concrete."

36. Measurement.—Measurement of all excavation will be by cross sections taken before and after completion of the work, and will be estimated as solid; measurement of the concrete will be taken by cross sections to the outside lines of the finished work.

37. Prices bid.—The prices bid on crib excavation and on earth excavation must include the removal of the material to its place of deposit and the rehandling of the sound stone for later use in concrete; the price bid for concrete must include the erection of the necessary forms, the supplying of sheeting, spikes, nails, and other fastenings, and of the removal of such timber as may be ordered by the engineer to be removed when the work is finished.

38. Payment.—Payment will be made by the cubic yard for "Crib excavation," "Earth excavation," and "Concrete" on monthly estimates prepared by the engineer, of the work done during the preceding month, retaining ten (10) per centum of each estimate until the satisfactory completion of the contract.

39. Material.—All material of every description will be supplied by the contractor, except such quantities of stone as may be taken from the old work and found suitable for use in making concrete

40. Excavation.—All crib excavation and earth excavation shall conform to such lines, slopes, and grades as shall be given from time to time by the engineer. Anything taken out beyond such
13 lines, slopes, and grades will not be paid for and must be back filled by the contractor at his own expense.

41. Cement, Portland.—The cement shall be an American Portland, dry and free from lumps. By a Portland cement is meant the product obtained from the heating or calcining up to incipient fusion of intimate mixtures, either natural or artificial, of argillaceous with calcareous substances, the calcined product to contain at least 1.7

times as much of lime, by weight, as of the materials which give the lime its hydraulic properties, and to be finely pulverized after said calcination, and thereafter additions or substitutions for the purpose only of regulating certain properties of technical importance to be allowable to not exceeding two (2) per cent of the calcined product.

42. Package.—The cement shall be put in strong, sound barrels, well lined with paper, so as to be reasonably protected against moisture, or in stout cloth or canvas sacks. Each package shall be plainly labeled with the name of the brand and of the manufacturer. Any package broken or containing damaged cement may be rejected or accepted as a fractional package, at the option of the United States agent in local charge.

43. Brand.—No cement will be allowed to be used except established brands of high-grade Portland cement, which have been made by the same mill and in successful use under similar climatic conditions to those of the proposed work for at least three years.

44. Weight.—The average weight per barrel shall not be less than 375 pounds net. Four sacks shall contain one barrel of cement. If the weight, as determined by test weighings, is found to be below 375 pounds per barrel, the cement may be rejected or, at the option of the engineer officer in charge, the contractor may be required to supply, free of cost to the United States, an additional amount of cement equal to the shortage.

45. Tests.—Tests will be made by the United States of the fineness, specific gravity, soundness, time of setting, and tensile strength of the cement.

46. Fineness.—Ninety-two per cent of the cement must pass through a sieve made of No. 40 wire, Stubb's gauge, having 10,000 openings per square inch.

47. Specific gravity.—The specific gravity of the cement, as determined from a sample which has been carefully dried, shall be between 3.10 and 3.25.

48. Soundness.—To test the soundness of the cement, at least two pats of neat cement mixed for five minutes with 20 per cent of water by weight shall be made on glass, each pat about three inches in diameter and one-half inch thick at the center, tapering thence to a thin edge. The pats are to be kept under a wet cloth until finally set, when one is to be placed in fresh water for twenty-eight days. The second pat will be placed in water which will be raised to the boiling point for six hours, then allowed to cool. Neither should show distortion or cracks. The boiling test may or may not reject, at the option of the engineer officer in charge.

49. Time of setting.—The cement shall not acquire its initial set in less than forty-five minutes and must have acquired its final set in ten hours.

The pats made to test the soundness may be used in determining the time of setting. The cement is considered to have ac-
14 quired its initial set when the pat will bear, without being appreciably indented, a wire one-twelfth inch in diameter loaded to weigh one-fourth pound. The final set has been acquired

when the pat will bear, without being appreciably indented, a wire one twenty-fourth inch in diameter loaded to weigh one pound.

50. Tensile strength.—Briquettes made of neat cement, after being kept in the air for twenty-four hours under a wet cloth and the balance of time in water, shall develop tensile strength per square inch as follows:

After seven days, 450 pounds; after twenty-eight days, 540 pounds.

Briquettes made of one part cement and three parts standard sand, by weight, shall develop tensile strength per square inch as follows:

After seven days, 140 pounds; after twenty-eight days 220 pounds.

51. Result.—The highest result from each set of briquettes made at any one time is to be considered the governing test. Any cement not showing an increase of strength in the twenty-eight day tests over the seven-day tests will be rejected.

52. Proportions.—When making briquettes neat cement will be mixed with 20 per cent of water by weight, and sand and cement with 12½ per cent of water by weight. After being thoroughly mixed and worked for five minutes, the cement or mortar will be placed in the briquette mould in four equal layers, and each layer rammed and compressed by thirty blows of a soft brass or copper rammer three-quarters of an inch in diameter (or seven-tenths of an inch square, with rounded corners), weighing one pound. It is to be allowed to drop on the mixture from a height of about half an inch. When the ramming has been completed, the surplus cement shall be struck off and the final layer smoothed with a trowel held almost horizontally and drawn back with sufficient pressure to make its edge follow the surface of the mould.

53. Samples.—The above are to be considered the minimum requirements. Unless a cement has been recently used on work under this office, bidders will deliver a sample barrel for test before opening of bids. Such sample barrels of cement are to be addressed to Major E. H. Ruffner, Corps of Engineers, U. S. Army, Louisville, Ky. If this sample shows higher tests than those given above, the average of tests made on subsequent shipments must come up to those found with sample.

54. Rejection.—A cement may be rejected in case it fails to meet any of the above requirements. An agent of the contractor may be present at the making of the tests or, in case of the failure of any of them, they may be repeated in his presence. If the contractor so desires, the engineer officer in charge may, if he deem it to the interest of the United States, have any or all of the tests made or repeated at some recognized standard testing laboratory in the manner herein specified. All expenses of such tests to be paid for by the contractor. All such tests shall be made on samples furnished by the engineer officer from cement actually delivered to him. All rejected cement must be immediately removed from the storehouse by the contractor at his own expense. In case of failure to promptly do so when ordered the engineer, in his discretion, may suspend payments until the rejected cement has been removed. The right is reserved by the United States to require the contractor to furnish cement of a

different brand if that furnished does not fulfill the requirements.

55. Cement, natural.—Natural cement shall be freshly packed, dry, and free from lumps. By natural cement is meant one made by calcining natural rock at a heat below incipient fusion and grinding the product to powder.

The cement shall be put up in strong, sound barrels, well lined with paper so as to be reasonably protected against moisture, or in stout cloth or canvas sacks. Each package shall be plainly labeled with the name of the brand and of the manufacturer. Any package broken or containing damaged cement may be rejected or accepted as a fractional package, at the option of the engineer in local charge.

No cement will be allowed to be used except established brands of high-grade natural cement which have been in successful use under similar climatic conditions to those of the proposed work.

The average net weight per barrel shall not be less than 265 pounds. Two sacks of cement shall have the same weight as one barrel. If the average net weight, as determined by test weighings, is found to be below 265 pounds per barrel, the cement may be rejected or, at the option of the engineer officer in charge, the contractor may be required to supply, free of cost to the United States, an additional amount of cement equal to the shortage.

Tests will be made of the fineness, time of setting, and tensile strength of the cement.

56. Fineness.—At least 80 per cent of the cement must pass through a sieve made of No. 10 wire, Stubb's gauge, having 10,000 openings per square inch.

57. Time of setting. The cement shall not acquire its initial set in less than twenty minutes and must have acquired its final set in four hours.

The time of setting is to be determined from a pat of neat cement mixed for five minutes with 30 per cent of water by weight and kept under a wet cloth until finally set. The cement is considered to have acquired its initial set when the pat will bear, without being appreciably indented, a wire one-twelfth inch diameter loaded to weigh one-fourth pound. The final set has been acquired when the pat will bear, without being appreciably indented, a wire one twenty-fourth inch in diameter loaded to weigh one pound.

58. Tensile strength.—Briquettes made of neat cement shall develop the following tensile strengths per square inch, after having been kept in air for twenty-four hours under a wet cloth and the balance of time in water:

At the end of seven days, 90 pounds; at the end of twenty-eight days, 200 pounds.

Briquettes made of one part cement and one part sand by weight shall develop the following tensile strengths per square inch:

After seven days, 60 pounds; after twenty-eight days, 150 pounds.

The highest result from each set of four briquettes made at any one time is to be considered the governing test. Any cement not showing an increase of strength in the twenty-eight day tests over the seven-day tests will be rejected.

The neat cement for briquettes shall be mixed with 30 per cent of water by weight, and the sand and cement with 17 per cent of water by weight. After being thoroughly mixed and worked for five minutes the cement or mortar is to be placed in the briquette mold in four equal layers, each of which is to be rammed and com-
16 pressed by thirty blows of a soft brass or copper rammer three-fourths of an inch in diameter (or seven-tenths of an inch square with rounded corners), weighing one pound. It is to be allowed to drop on the mixture from a height of about half an inch. Upon the completion of the ramming the surplus cement shall be struck off and the last layer smoothed with a trowel held nearly horizontal and drawn back with sufficient pressure to make its edge follow the surface of the mold.

The above are to be considered the minimum requirements. Unless a cement has been recently used on work under this office, bidders will deliver a sample barrel for test before the opening of the bids. Any cement showing by sample higher tests than those given must maintain the average so shown in subsequent deliveries.

A cement may be rejected which fails to meet any of the above requirements. An agent of the contractor may be present at the making of the tests or, in case of the failure of any of them, they may be repeated in his presence. If the contractor so desires, the engineer officer may, if he deems it to the interest of the United States, have any or all of the tests made or repeated at some recognized standard testing laboratory in the manner above specified. All expenses of such tests shall be paid by the contractor, and all such tests shall be made on samples furnished by the engineer officer from cement actually delivered to him.

59. Concrete.—Concrete shall be composed of one part of natural cement to two parts of sand and four parts of broken stone or gravel, or a mixture of the two satisfactory to the engineer, all measured by volume. Facing shall be composed of one part of American Portland cement to two parts of sand, by volume, and shall be two inches thick. All cement used must be of a brand to be first approved by the engineer; all sand shall be sharp and clean; all stone and gravel shall be hard, sound, and clean, and may run from one-eighth inch to pieces passing a two-inch ring; large stone may be bedded in the concrete with mortar, subject to the approval of the engineer. It is thought that most of the stone for the concrete can be obtained from the present structures.

The cement must be taken from a batch of at least 5 barrels, spread on a clean platform and thoroughly mixed; the stone shall be thoroughly drenched before being put with the cement. The amount of water used in the concrete, the method of mixing, and the placing shall be subject to the direction and approval of the engineer or his agent. As soon as the concrete is deposited it shall be thoroughly rammed in layers about six inches thick, using iron rammers with face of not more than thirty square inches and of not less than twenty pounds weight, each layer being placed before the one next below it has set. No concrete or mortar shall be used after it has, in the opinion of the engineer, attained, or is about to attain, its initial

set. Any concrete placed in disregard of instructions of the engineer must, if so required by the engineer, be removed by the contractor at his own expense. No concrete or mortar shall be placed in freezing weather. All forms must be kept damp until the concrete inside has thoroughly set; the time of their removal shall be subject to the orders of the engineer.

60. Blueprints.—Blueprint drawings showing the method of construction may be seen at this office; they shall form a part of
17 these specifications, and shall not be departed from except as may be found necessary by the condition of the old timber encountered.

61. Time.—From the nature of the work, operations can not advantageously be commenced until the season of high water has passed. As soon as the river is low enough work shall be commenced and shall be pushed forward as rapidly as possible, with the understanding that the old work shall be torn out and rebuilt progressively, and only to such an extent as, in the opinion of the engineer, can be completed before the next season of high water shall commence. With an average season of low water the whole work can and must be completed by December 1, 1902, but in case of an unusual season work shall be suspended when so ordered by the engineer; it shall be resumed within one month after receiving notice to begin again, and shall be finished before September 1, 1903.

In order to get this work completed at as early a date as possible, it shall be, if so directed by the engineer, carried on night and day.

62. Order of work.—The engineer shall have power to prescribe the order and manner of executing the work in all its parts; no work not ordered by him will be paid for. An inspector will be kept on the work, who will receive instructions from the resident engineer, and will have power to object to materials or work. Any materials or work objected to by him shall be kept out of or removed by the contractor from the finished work, and unless the objections be overruled by the resident engineer no estimate or payment shall be made until such materials or work shall have been so removed. In all cases of dispute upon matters relating to the work the decision of the United States engineer officer in charge shall be accepted as final and without appeal.

63. Failure to prosecute work.—If at any time the contractor shall refuse or fail to prosecute the work, or to provide for carrying on the same as directed by the engineer, the engineer shall have the power to employ men, to purchase or otherwise provide materials, tools, machinery, etc., and put the work in proper advancement or condition, and the entire cost of doing so shall be deducted from payments to be made under this contract. But this provision shall not affect the right of the United States to waive the time limit or annul the contract as provided therein.

64. Complete work.—The contractor shall not take advantage of any omissions of details in drawings or specifications, or errors in either, but will be required to do everything which may be necessary to carry out in good faith this contract, which contemplates everything complete, of good material, and work skillfully and properly

constructed. Any point not clearly understood is to be referred to the resident engineer for decision.

65. Changes.—Should any minor changes in the details of the work be deemed necessary or advisable during construction, such changes must be made by the contractor at the same unit prices as those of the bid; but any changes which will either increase or diminish the cost of the work must be provided for by supplemental agreement, as stiuplated in the form of contract to be entered into.

66. Losses.—Material of any kind lost or damaged, either in the finished work or before it has become part of the finished work, must be replaced by the contractor at his own expense.

67. Stakes and assistance.—The lines and levels for the
18 work having been given by the engineer, the contractor must conform thereto and must keep all stakes in position at his own expense. He must furnish at his own expense all the stakes and the labor to set them, with all facilities, assistance, and appliances, except engineering assistance and instruments, to enable the engineer to lay out, inspect, and measure any work.

68. Rubbish.—Within sixty days after completion of the work, and before the final payment is made, the contractor shall remove all such rubbish as the engineer shall direct, and shall leave the site thoroughly clean and in good condition and order, without expense to the United States.

69. Annulment.—In case of annulment of the contract for any of these items, as conditionally provided for in the regular form of agreement, the United States shall have the right to retain all materials, tools, buildings, etc., or any part of the same, together with any or all leases, rights of way, or quarry privileges, under purchase, at a valuation to be determined by the engineer.

70. Investigation.—It is expected that each bidder will visit the site of this work, the office of the lockmaster, and the office of the local engineer and ascertain the nature of the work, the general character of the river as to floods and low water, and obtain the information necessary to enable him to make an intelligent proposal.

71. Materials not mentioned.—Payment will be made to the contractor only as hereinbefore specified. All materials and work not mentioned as to be estimated for payment, and which may be necessary to complete the work, shall be furnished by the contractor at his own expense.

72. Engineer.—Wherever the word "engineer" is used in these specifications it will be understood to refer to the United States engineer officer in charge of the work, or his authorized agents, acting under his directions.

73. Approximate quantities.—Owing to the nature of the work, it is impossible to estimate with accuracy the quantities required under each item. The approximate quantities given below will be used in canvassing the bids, but bidders must so fix their prices as to permit increase or diminution in the quantities required within the limits stated for each; and it is understood and agreed that such increase or diminution, whether resulting from error in estimate, modification of plans, or condition of old structure, shall not be considered

as increasing or diminishing the cost of the work, and shall form no basis for any claim against the United States.

Repairs to Dam No. 1, Green River, Ky.

	Approximate quantities, cu. yds.	May be increased, per cent.	May be decreased, per cent.
Concrete	5,953	20 per cent.	20 per cent.
Earth excavation	3,970	20 "	20 "
Crib excavation	4,693	20 "	20 "

The United States will not be responsible for accidents or injuries to the contractor's employés, plant, or materials, nor for any damage done by or to them from any source or cause.

74. Machinery supplied by the United States.—The contractor will be allowed the use, subject to the verbal instructions of the engineer, of the following United States property, delivered to him at the place designated below. He shall be responsible for the safety of all the plant entrusted to him, shall repair all damage to it, and shall return it to the United States in as good a condition as when he received it, ordinary fair wear and tear excepted.

19

An inventory of all the property lent to the contractor will be taken and receipted by him; this will be checked over when the plant is returned to the United States, and any articles missing or badly damaged must be replaced by him with others of similar size and quality, to the satisfaction of the engineer, before payment of the final estimate is made. The men employed to run any machinery must first be approved by the engineer.

At Lock No. 1, Green River, Ky.

One double cylinder, double drum, hoisting engine, with boiler.
One single cylinder, single drum, hoisting engine, with boiler.
One 10x12 engine.
One 12x14 engine.
One 20 H.-P. boiler.
One centrifugal pump, 10 in. or 12 in.
One concrete mixer.
Two Wells' lights.

75. No work will be permitted on Sunday or legal holidays, except by written authority of the engineer officer in charge, and then only in cases of emergency.

Louisville, Ky., June 5, 1902.

1. This agreement entered into this twenty-third day of July, nineteen hundred and two, between Major E. H. Ruffner, Corps of Engineers, United States Army, of the first part, and Archibald Hollerbach and Samuel L. May, composing the firm of Hollerbach & May, all of Evansville, in the county of Vanderburgh, State of

Indiana, of the second part, witnesseth, that in conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said Major E. H. Ruffner, Corps of Engineers, United States Army, for and in behalf of the United States of America, and the said Hollerbach & May do covenant and agree, to and with each other, as follows:

That the said Hollerbach & May shall make repairs to dam number one, Green River, Kentucky, in accordance with and as required by said specifications.

That for said repairs satisfactorily completed in accordance with the requirements of said specifications, and accepted thereunder by the proper agent of the United States, the United States shall pay the said Hollerbach & May for the several classes of work, as specified and described in said specifications, at rates as follows, viz:

For crib excavation, eighty (80) cents per cubic yard.

For earth excavation, fifty-five (55) cents per cubic yard.

For concrete, five dollars and ten cents ($5.10) per cubic yard.

2. All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as do not conform to the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final.

3. The said party of the second part shall commence, prosecute, and complete the work herein contracted for as set forth in paragraph 61 of the attached specifications.

4. If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, and upon the giving of such notice all payments to the party or parties of the second part under this contract shall cease, and all money or reserved percentage due or to become due the said party or parties of the second part, by reason of this contract, shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by the said United States, in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the party of the second part; and the party of the first part may deduct all the above-mentioned sums out of or from the money or reserved percentage retained as aforesaid; and upon the

giving of the said notice the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials, by contract or otherwise in accordance with law.

5. It is further agreed that if the party of the second part shall fail to prosecute the work covered by this contract so as to complete the same within the time agreed upon, the party of the first part may, with the prior sanction of the Chief of Engineers, in lieu of annulling the contract under the preceding paragraph, waive the time limit and permit the party of the second part to finish the work within a reasonable period, to be determined by the said party of the first part. Should the original time limit be thus waived, all expenses for inspection and superintendence, and all other actual losses and damages to the United States due to the delay beyond the time originally set for completion shall be determined by the said party of the first part and deducted from any payments due or to become due the party of the second part: Provided, however, That the party of the first part may, with the prior sanction of the Chief of Engineers, remit the charges for expenses of inspection and superintendence for so much time as in the judgment of the said party of the first part may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by epi-
21 demics, local or State quarantine restrictions, or other unforeseeable cause of delay arising through no fault of the party of the second part, and which actually prevented him (or them) from commencing or completing the work or delivering the materials within the period required by the contract, but such waiver of the time and remission of charges shall in no other manner affect the rights or obligations of the parties under this contract.

6. If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, That no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

7. No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed

upon by the contracting parties and approved by the Chief of Engineers.

8. The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

9. It is further agreed by and between the parties hereto that until final inspection and acceptance of, and payment for, all of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the party of the first part to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

10. The party of the second part further agrees to hold and save the United States harmless from and against all and every demand, or demands, of any nature or kind for, or on account of, the use of any patented invention, article, or process included in the materials hereby agreed to be furnished and work to be done under this contract.

11. Payments shall be made to the said party of the second part as prescribed in paragraph 38 of the specifications hereto attached and forming part of this agreement.

12. Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferrer or the transferee, but all rights of action for
22 any breach of this contract by said Hollerbach & May are reserved to the United States.

13. No Member of or Delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom.

14. This contract shall be subject to approval of the Chief of Engineers, U. S. A.

In witness whereof the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

E. H. RUFFNER,
Major, Corps of Engineers.

Witnesses:
EDWIN P. MAY AS TO

HOLLERBACH & MAY,
By SAMUEL L. MAY,
Member of Firm.

(Executed in quintuplicate.)

Approved, August 19, 1902.

A. MACKENZIE,
Acting Chief of Engineers, U. S. Army.

23 III. *Traverse.*

(Filed December 6, 1911.)

In the Court of Claims of the United States.

No. 29952.

ARCHIBALD HOLLERBACH and SAMUEL L. MAY, Partners, Doing Business as HOLLERBACH & MAY,
v.
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
Assistant Attorney General.

24 IV. *Argument and Submission.*

This case was argued on the 6th day of December, 1911, by Mr. William B. King for the claimants, and by Mr. Charles F. Jones for the defendants, and submitted.

25 V. *Findings of Fact, Conclusion of Law, and Opinion of Court.*

(Filed February 12, 1912.)

No. 29952.

ARCHIBALD HOLLERBACH and SAMUEL L. MAY, Partners, Doing Business as HOLLERBACH & MAY,
v.
THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following findings of fact:

I.

The claimants, Archibald Hollerbach and Samuel L. May, partners doing business as Hollerbach & May, of Evansville, Ind., on July 23, 1902, entered into a contract with the United States for repairs on Dam No. 1, Green River, Ky., in accordance with certain specifications annexed to said contract. Said contract and specifi-

cations are annexed to and made a part of the claimants' amended petition herein.

In the month of April, 1903, before any work was done under said contract, the Hollerbach & May Contract Co. was organized under the laws of Indiana with a capital stock of $50,000, of which 45 per cent was issued to each of the above named claimants and 5 per cent to Maggie May, daughter of said Hollerbach and wife of said May, and 5 per cent to Edwin P. May, brother of said Samuel L. May, who had been timekeeper and office assistant for the claimant partnership, and became the secretary of the company, performing the same duties.

On the organization of said corporation said contract of Hollerbach & May was taken over by said corporation and completed under the direction of the claimants. Said claimants were in active personal charge of the work under the contract until its completion and all the correspondence with the United States was carried on with said partnership, their letters being written on partnership letterheads, and all payments were made to the partnership. No change appears to have been made in the bond given by claimants at the time of signing the contract and no new bond was given by
26 said corporation. The accounts relating to this contract were carried on the books of the corporation. The partnership of Hollerbach & May continued, at least as far as this contract was concerned, until its completion and the corporation did all that was done by it for and under the direction of the claimants.

II.

Paragraph 35 of the specifications provides that "all material, whether timber or filling, ordered to be taken out of the old dam will be classified as 'crib excavation'; all excavation of the filling behind the dam will be classified as 'earth excavation.'"

Prior to the advertisement for bids for said work there were deposited back of said dam as filling or backing about 12,000 cubic yards of stone, sawdust, and dredge material, 800 cubic yards of which, consisting of sawdust and dredge material, were deposited during the years 1900 and 1901. As the contractors proceeded with the work of removing the material behind the dam it was found that said dam was not backed with broken stone, sawdust, and sediment as stated in paragraph 33 of the specifications, but that said backing was composed of a soft slushy sediment from a height of about 2 feet from the crest to an average depth of 7 feet, and below that to the bottom of the required excavation said dam was backed by cribwork of an average height of 4.3 feet consisting of sound logs filled with stones.

III.

There was removed from the backing of said dam 1,183.55 cubic yards of material classified as earth excavation, and 633.50 cubic yards of material classified as crib excavation, making a total of 1,817.05 cubic yards of material actually removed from said backing, all of which had to be removed by hand, at a cost of 35 cents

per cubic yard for the earth excavation, and for the crib excavation at a cost of $3,327.52 over and above the contract price of 80 cents per cubic yard received from the United States, making a total of $3,834.32.

The contractors did not excavate back of the dam for a distance of about 175 feet to the line on which the estimate given in paragraph 73 of the specifications was based. Had they done so the quantity of excavation would have been somewhat increased, but to what extent does not appear.

The minimum quantity of earth excavation fixed by paragraph 73 of the specifications was 3,176 cubic yards. Deducting from this the 1,817.05 cubic yards actually excavated as above stated, would leave 1,358.95 cubic yards of excavation not required of claimants.

If the dam had been backed for 50 feet with broken stone, sawdust, and sediment to a height of within 2 or 3 feet of the crest, as stated in paragraph 73 of the specifications, additional earth excavation beyond that required by claimants could have been performed by them, with the machinery and appliances then on the works, at a cost of 20 cents per cubic yard, and the profits lost to claimants by reason of the failure of the United States to furnish said minimum quantity of excavation would be 35 cents per cubic yard, or $475.63.

27 IV.

If the dam had been backed for 50 feet with broken stone, sawdust, and sediment to a height of 2 or 3 feet of the crest, as stated in paragraph 33 of the specifications, the material could have been excavated in much less time with dredges and used in the construction of the bulkhead or cofferdam, a necessary part of the work to be done. Some of the stone taken from the backing of the dam was used in the construction of said cofferdam, but claimants were obliged to and did get stone and other materials for its construction elsewhere at a cost to them of $2,184.08.

V.

If the dam had been backed for 50 feet with broken stone, sawdust, and sediment, as stated in paragraph 33 of the specifications, the actual cost to claimants of removing it, with the machinery and appliances then on the works, would not have been more than 20 cents per cubic yard, instead of 35 cents per cubic yard as hereinbefore stated, making a loss to claimants of 15 cents per cubic yard on 1,183.55 cubic yards, or $177.53.

Had the 633.50 cubic yards of material excavated from the backing of the dam and classified as crib excavation been broken stone, sawdust, and sediment, out of which the cofferdam could be constructed as indicated in said paragraph 33, the actual cost to claimants of removing same, with the machinery and appliances then on the works, and using it in said cofferdam, would not have been more than 20 cents per cubic yard, or $126.70, instead of $3,834.32 as hereinbefore stated, a difference in the cost to claimants on this item of $3,707.62.

VI.

The contract provided that the work should be begun as soon as the river was low enough, and, with an average season of low water, be completed by December 1, 1902, but in case of an unusual season it should be completed by September 1, 1903.

At the time the contract was entered into claimants were engaged in other work for the United States on the Kentucky River which was near completion. Both pieces of work were under the control of Maj. E. H. Ruffner, Corps of Engineers, United States Army, and the claimants being unable to complete both contracts within the time limit, that officer desired claimants to push their work on the Kentucky River contract so as to finish it in the season of 1902. For this reason and owing to claimants being unable to obtain cement for delivery during the season of 1902 no work was done under the contract that year. In the season of 1903 the condition of the water was such that the claimants could not begin work until September 1 of that year. While in progress the work was prosecuted with due diligence and was completed November 27, 1904.

If the dam had been backed for about 50 feet with broken stone, sawdust, and sediment to a height of within 2 or 3 feet of the crest, claimants could have finished the work by November 1, 1903. The failure to complete it by that time was due to the greater length of time required to remove by hand the cribwork found in the backing of the dam than would have been required to remove broken stone, sawdust, and sediment by machinery.

28 If the condition back of the dam had been as represented in the specifications the work would have been done in 60 days, but because such condition was not as so represented the work was delayed 90 days, and consequently took 5 months for completion.

VII.

August 17, 1903, claimants asked for an extension of the time until December 31, 1903, which was granted, with the provision that they be charged with all expense of inspection and supervision. The engineer officer in charge decided that such extension or waiver of the time limit was more in the interest of the United States than to annul the contract. A further extension of time to December 1, 1904, was granted at request of claimants.

Deduction was made from the amount found due claimants of expenses of inspection and superintendence by the United States as follows:

September, 1903	$200
October, 1903	200
September, 1904	100
October, 1904	150
November, 1904	150
Total	800

Had the work been done in the seasons of 1902 and 1903 the same expenses for inspection and superintendence would have been required.

VIII.

Claimants made oral and written protests as to the deficiency in earth excavation, as to the cost of bringing material for cofferdams, as to extra expense of excavation, and as to the deduction of cost of inspection to the engineer officer in charge, and after the completion of the work their claim was reported to the Chief of Engineers and rejected by him.

Conclusion of Law.

Upon the foregoing findings of fact the court decides as a conclusion of law that the claimants are entitled to recover from the United States judgment in the sum of $795.63 on Findings III and VII, and that the petition as to the several items set forth in the other findings be dismissed.

Opinion.

BARNEY, *J.*, delivered the opinion of the court:

This is a suit for balances alleged to be due upon a contract for repair work on Dam No. 1, Green River, Ky. The following is a summary of the several claims made by the plaintiffs:

Loss of profits by deficiency in earth excavation furnished them	$896.60
Cost of obtaining material warranted by paragraph 33 to be present at the site	2,184.08
Excess of cost of excavating sediment over excavation of material warranted by paragraph 33	295.89
Excess of cost of excavating crib in the backing over the cost of excavating material warranted by paragraph 33	5,827.52
Deduction for inspection	800.00
Total	10,004.09

29 Before proceeding to discuss the merits of the case it is necessary to dispose of the point raised by the defendants that this suit should be dismissed because, as is claimed, the contract upon which it is founded was transferred within the provision of section 3737 of the Revised Statutes, which is as follows:

"No contract or order, or any interest therein, shall be transferred by the party to whom said contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties are reserved to the United States."

The findings upon this subject show that in April, 1903, but after

the execution of the contract in question, a corporation called the Hollerbach & May Contract Co. was organized under the laws of the State of Indiana, 90 per cent of the stock of which was taken by the plaintiffs and the balance by relatives. This corporation performed the work called for under the contract to the extent that the accounts relating to its performance were carried on in its books of account; but the claimants continued in active personal charge of the work until its conclusion; all of the correspondence with the Government relating to it was carried on in their name, and all payments were made to them. The partnership of Hollerbach & May continued, at least so far as this contract was concerned, until its completion, and the corporation did all that was done by it for and under the direction of the partnership. We do not think these facts show any transfer of said contract or any interest therein within the meaning of section 3737 of the Revised Statutes, or in fact of any transfer of any interest in the contract whatsoever. The plaintiffs never relinquished the complete control and management nor any of the emoluments of the contract, and the work done by the corporation was not different in character or effect from that of any other employee. We do not think the cases cited by the Government upon this question have any application to a case like this, but rather that it is controlled by the reasoning in Hobbs v. McLean (117 U. S., 567-575).

We will now consider the several items of the plaintiffs' claim in the order as hereinbefore given.

The first item claimed is for loss of profits by reason of the deficiency in the earth excavation furnished. The amount of earth excavation required by the contract was 3,970 cubic yards, with a permissible increase or decrease of 20 per cent, thus leaving a minimum of 3,176 cubic yards. The findings show that the plaintiffs were furnished 1,183.55 cubic yards of earth excavation and 633.5 cubic yards of other material classified as crib excavation, for which they were paid at the contract price, thus making in all 1,817.05 cubic yards excavated, and this amount deducted from the minimum as provided in the contract leaves 1,358.95 cubic yards' deficiency, on account of which the plaintiffs are entitled to recover the profit which they would have made if the earth excavation had been as represented, and which profit the findings show to be $475.63, and this item is allowed in that sum.

The next three items of the plaintiffs' claim are for damages alleged on account of what is contended to be a breach of warranty under paragraph 33 of the specifications, and can be grouped and considered together, as they all depend upon the construc-
30 tion of the same provisions in the specifications. The following are the paragraphs of the specifications which are to be considered in the decision as to these items:

"20. It is understood and agreed that the quantities given are approximate only, and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders, or their authorized agents, are expected to examine the maps and drawings in this office, which are open to their

inspection, to visit the locality of the work, and to make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies.

* * * * * * *

"33. The present dam, a wooden crib structure, is 528 feet long between abutments and about 52 feet wide at its base. The expected depth of concrete work is shown on the blue prints, but it may be made greater as the condition of the old timber may render it necessary. The work shall be carried out in sections, generally from 50 to 100 feet long, and no more of the old work shall be torn out than can be rebuilt in a few days in case of necessity. All the exterior surfaces of the concrete shall be faced with the facing described in paragraph 59, which shall be placed before the concrete below has set, and shall be smoothly finished off. The dam is now backed for about 50 feet with broken stone, sawdust, and sediment to a height of within 2 or 3 feet of the crest, and it is expected that a cofferdam can be constructed with this stone, after which it can be backed with sawdust or other material. The excavation behind the dam will be required to go to the bottom, and it is thought that a slope of 1 horizontal to 1.2 vertical will give ample room.

* * * * * * *

"60. Blue prints. Blue-print drawings showing the method of construction may be seen at this office; they shall form a part of these specifications and shall not be departed from except as may be found necessary by the condition of the old timber encountered.

* * * * * * *

"70. Investigation. It is expected that each bidder will visit the site of this work, the office of the lock master, and the office of the local engineer and ascertain the nature of the work, the general character of the river as to floods and low water, and obtain the information necessary to enable him to make an intelligent proposal."

* * * * * * *

It is contended by the plaintiffs that the following extract, from paragraph 33 above quoted, is a representation amounting to a warranty:

"The dam is now backed for about 50 feet with broken stone, sawdust, and sediment to a height of within 2 or 3 feet of the crest."

As the findings show that the dam was not backed with "broken stone, sawdust and sediment, as represented in paragraph 33 above quoted," at least only to a small extent, and that below a covering of sediment was found the cribwork of an old dam of solid logs filled with large stones, which was very expensive in its excavation, and no part of which could be used in the construction of the
31 cofferdam, the decision upon this contention will settle this branch of the case. We have thus before us for decision the old question so often presented in this court in the construction of Government contracts. When does a representation amount to a warranty, and how far is it modified by other provisions of the contract? If paragraph 33 stood alone in the contract for construction

we believe the extract quoted should be regarded as a warranty as to the material backing the dam. It was a positive and material representation as to a condition presumably within the knowledge of the Government, and upon which, in the absence of any other provision or warning, the plaintiffs had a right to rely. We are compelled, however, in the construction of this provision to take into account other provisions of the specifications, notably paragraphs 20 and 70. In paragraph 20 it is said, "It is understood that the quantities given are approximate only, and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. * * * Bidders, or their authorized agents, are expected * * * to visit the locality of the work and to make their own estimates, etc."

In paragraph 70 it is said: "Investigation. It is expected that each bidder will visit the site of the works * * * and ascertain the nature of the work, etc." If it were not for these cautionary provisions of the contract this case would undoubtedly come within the ruling of this court in The Atlantic Dredging Co. v. U. S. (35 Ct. Cls., 463), and which is much relied upon by the plaintiffs. In the latter case the representation was very nearly in the terms of the representation in the case at bar, and it was held to be a warranty. An examination of the contract, however, in that case shows that the representation as made was not qualified by any other provision in the contract, and that the contract contained no cautionary provisions whatsoever. For that reason that case can not be regarded as an authority in this case. The condition of the backing of the dam was not peculiarly within the knowledge of the Government, but was a subject about which the plaintiffs had equal means of informing themselves, and they had been warned so to do.

Without any further discussion of this question we will simply add that we think this case comes within the decisions of this court in the following cases: Simpson v. U. S. (31 Ct. Cls., 217), affirmed 172 U. S., 372; Lewman v. U. S. (41 Ct. Cls., 470); Griefen v. U. S. (43 Ct. Cls., 107), and that the representation as to the condition back of the dam can not be regarded as a warranty and the items growing out of that contention are disallowed.

The last item of the plaintiffs' claim is for the recovery of the deductions which were made from the amounts found due to the plaintiffs under the contract of expenses of inspection and superintendence.

It appears from the findings that (1) the plaintiffs had two contracts with the Government for completion in 1902, one on the Kentucky River and the other the contract in question in this case, and were unable to complete both contracts within the time limit. That being the case, and desiring to push the Kentucky River contract to completion, the engineer in charge of both works granted an extension of time on the Green River work to December 31, 1903. Another extension of time was granted at the plaintiffs' request to December 1, 1904; (2) that the work during its progress was prosecuted with due diligence; (3) that if the work had been done in the seasons
32 of 1902 and 1903, as provided in the contract, the same expenses for inspection and superintendence would have been

required; (4) that while in progress the delay in the completion of the work was caused by the extra time required to remove the cribwork found in the backing of the dam instead of the "broken stone, sawdust, and sediment," as represented in the specifications, and this unexpected condition caused a delay of 90 days. It also appears that the plaintiffs duly protested against the making of such deductions.

That part of the contract relating to this subject is found in paragraph 5, which has the following provision:

"Should the original time limit be thus waived, all expenses for inspection and superintendence, and all other actual losses and damages to the United States due to the delay beyond the time originally set for completion shall be determined by the said party of the first part and deducted from any payments due or to become due the party of the second part."

It is true, as before stated, that after beginning the work it was prosecuted with due diligence, and the delay after that time was caused by the finding of conditions other than were represented in the specifications; but if we adhere to the decision that this representation was not a warranty, we do not see that this fact can relieve the plaintiffs from paying the cost of inspection during such time as they were delayed on account of this unexpected condition back of the dam. The work was not begun in the season of 1902, through no fault of the Government, but as the plaintiffs were under two contracts, one on the Kentucky River and the other the one we are considering, it desired to push to completion the Kentucky River contract within the time limited rather than the latter. The conditions represented in the specifications were not warranted, and that being the case the plaintiffs in law are presumed to engage as to the time for the completion of the work with a knowledge of the conditions as they actually existed. They agreed to finish the work by September 1, 1893, at the latest. They did not do so and must take the consequences, one of which is to pay the cost of inspection and superintendence during such time as the Government was damaged on account of such dalay. Paragragh 5, above quoted, provides that "should the original time limit be thus waived, all expenses of inspection and superintendence and all other actual losses and damage to the United States due to the delay, etc., shall be deducted, etc." If there had been no delay in the work, and consequently no extension of time allowed for the completion of the contract, the Government would have been under the necessity of providing for inspection and superintendence during such timely prosecution of the work, which the findings show to have been 60 days. It therefore follows that the Government was only damaged by the cost of inspection and superintendence for the period of delay, which was 90 days, and no longer and deduction to that extent should have been made and no more. This would make the sum of $320 unjustly deducted, as shown by Finding VII.

Judgment is therefore ordered for the plaintiffs under Findings III and VII in the sum of $795.63, and the petition as to the several items set forth in the other findings dismissed.

33 VI. *Judgment of the Court.*

No. 29952.

ARCHIBALD HOLLERBACH and SAMUEL L. MAY, Partners, Doing Business as HOLLERBACH & MAY,

v.

THE UNITED STATES.

At a Court of Claims, held in the city of Washington on the 12th day of February, 1912, judgment was ordered to be entered as follows:

The Court, on due consideration of the premises, find in favor of the claimants and do order, adjudge and decree that the claimants, Archibald Hollerbach and Samuel L. May, partners, doing business as Hollerbach & May, do have and recover of and from the United States the sum of seven hundred and ninety-five dollars and sixty-three cents ($795.63).

BY THE COURT.

34 VII. *Application for Appeal.*

In the Court of Claims.

No. 29952.

ARCHIBALD HOLLERBACH and SAMUEL L. MAY, Partners, Doing Business as HOLLERBACH & MAY,

v.

THE UNITED STATES.

From the judgment rendered in this case on the 12th day of February, 1912, the claimants, Archibald Hollerbach and Samuel L. May, by their attorneys of record, make application for and give notice of an appeal to the Supreme Court of the United States.

KING & KING,
Attorneys for Claimants.

Filed in open Court April 16, 1912.

Whereupon it was ordered that the appeal be allowed as prayed for.

BY THE COURT.

35 In the Court of Claims.

ARCHIBALD HOLLERBACH and SAMUEL L. MAY, Partners, Doing Business as HOLLERBACH & MAY,

v.

THE UNITED STATES.

I, John Randolph, Assistant Clerk of the Court of Claims certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact, and conclusion of law—and opinion filed by the Court, of the judgment of the Court, of the application of the claimant for and the allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and the Seal of the Court of Claims this 29th day of April 1912.

[Seal Court of Claims, Reipublicæ Civibusque.]

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 23,191. Court of Claims. Term No. 250. Archibald Hollerbach and Samuel L. May, partners, doing business as Hollerbach & May, Appellants, vs. The United States. Filed April 29th, 1912. File No. 23,191.

5

IN THE

Supreme Court of the United States.

October Term, 1913.

ARCHIBALD HOLLERBACH and SAMUEL L. MAY, partners, doing business as HOLLERBACH & MAY;

v.

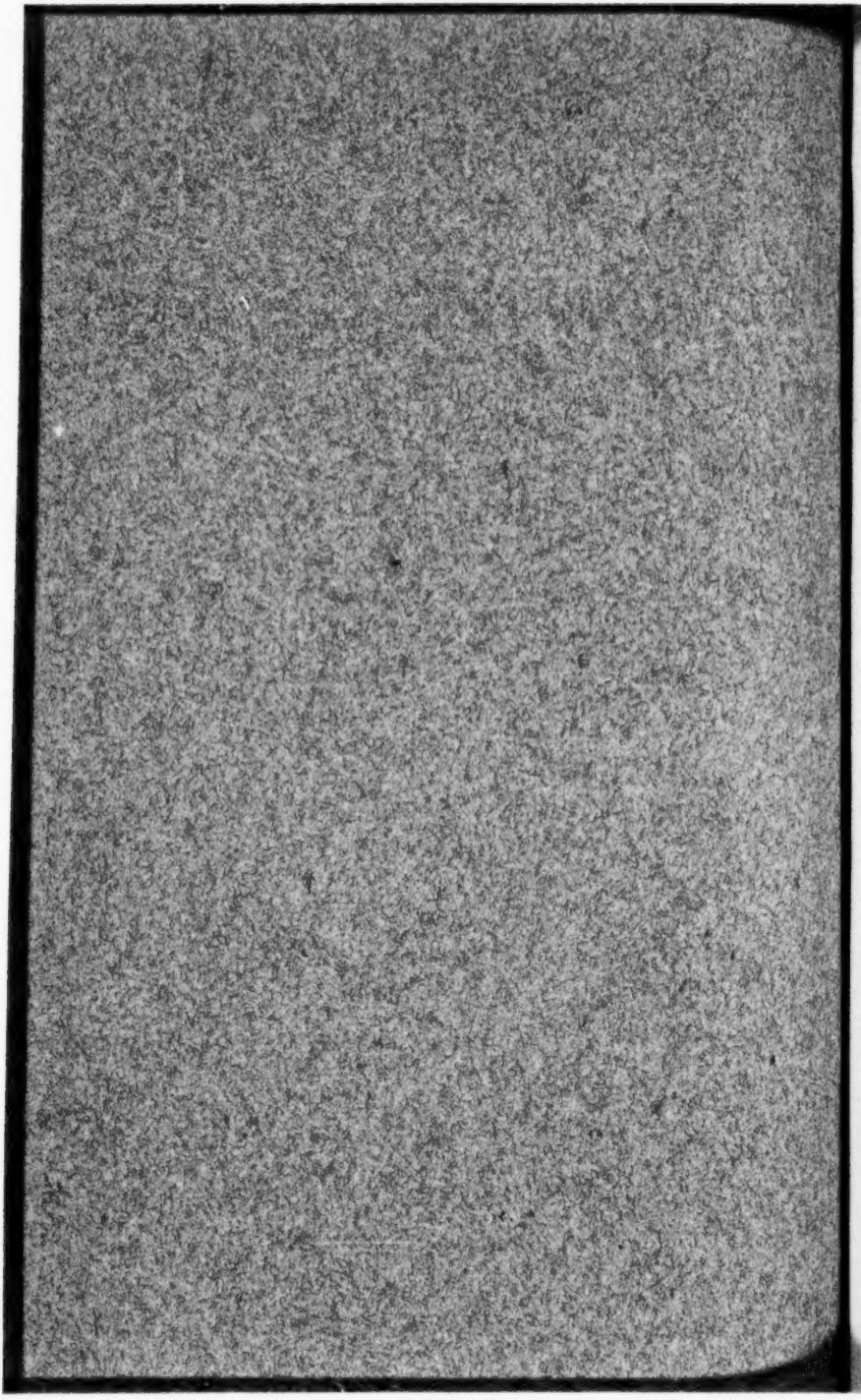
THE UNITED STATES.

No. 250.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANTS.

GEORGE A. KING,
WILLIAM B. KING,
WILLIAM E. HARVEY,
Attorneys for Appellants.



SUBJECT INDEX.

TABLE OF CASES.

IN THE

Supreme Court of the United States.

October Term, 1913.

ARCHIBALD HOLLERBACH and SAMUEL L. MAY, partners, doing business as HOLLERBACH & MAY,
v.
THE UNITED STATES.
No. 250.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANTS.

Statement of Case.

This is an appeal from the Court of Claims. The claim is based upon a contract with the United States for the repair of Dam No. 1, Green River, Kentucky. The petition, rec. p. 5, contains five items, the first four for damages for breach of contract, the last for a portion of the contract price withheld because the United States alleges that claimants delayed the completion of the contract. The Court of Claims gave judgment for Item 1, Deficiency in Earth Excavation, rec. pp. 2, 26, 29. No appeal has been taken by the United States and that item is therefore eliminated from the consideration of this court. The Court of Claims also allowed a portion of Item 5, Deduction for Inspection, rec. pp. 4, 5, 29.

All the items now before this court depend upon a

single question arising under the following provisions of the specifications:

Par. 33, rec. pp. 9–10:

"* * * The dam is now backed for about 50 feet with broken stone, sawdust, and sediment to a height of within 2 or 3 feet of the crest, and it is expected that a cofferdam can be constructed with this stone, after which it can be backed with sawdust or other material."

Par. 20, rec. pp. 7–8:

"* * * Bidders, or their authorized agents, are expected to examine the maps and drawings in this office, which are open to their inspection, to visit the locality of the work, and to make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies."

Par. 70, rec. p. 16:

"70. Investigation. It is expected that each bidder will visit the site of this work, the office of the lockmaster, and the office of the local engineer and ascertain the nature of the work, the general character of the river as to floods and low water, and obtain the information necessary to enable him to make an intelligent proposal."

The Court of Claims has found, Finding II, rec. p. 22:

"* * * As the contractors proceeded with the work of removing the material behind the dam it was found that said dam was not backed with broken stone, sawdust, and sediment as stated in paragraph 33 of the specifications, but that said backing was composed of a soft slushy sediment from a height of about 2 feet from the crest to an average depth of 7 feet, and below that to the bottom of the required excavation said dam was

backed by crib-work of an average height of 4.3 feet consisting of sound logs filled with stones."

As the result of this condition, the court has found four items of damage suffered by claimants, which would not have been suffered had the dam been "backed with broken stone, sawdust, and sediment," as stated in par. 33. These are as follows:

Finding IV, rec. p. 23: Cost of stone procured elsewhere in lieu of broken stone from behind the dam which could have been used in the work, $2,184,08.

Finding V, rec. p. 23: Excess of cost of removing the material actually found over the cost of removing "broken stone, sawdust and sediment," $3,885.15.

Findings VII–VIII, rec. p. 24: Deductions made on account of delay caused by the extra length of time required to remove the material found over "broken stone, sawdust and sediment," $480. The last sum is the difference between the original deduction of $800 and the amount allowed by the Court of Claims on this item, $320, rec. p. 29.

The court below decided, rec. pp. 27–28, that the general language used in pars. 20 and 70 of the specifications, *ante*, p. 2, controlled and rendered nugatory the special provision of par. 33, *ante*, p. 2.

Appellants contend that par. 33 contains an express warranty not affected by the general provisions of pars. 20 and 70.

Assignment of Error.

For error in the opinion and judgment in the court below, the appellants say:

1. That said court should have held that the warranty of a special fact in par. 33 above quoted is not qualified by the general language of pars. 20 and 70.

2. That the judgment of the court below should have been in favor of the claimants for all damages and deductions suffered by reason of the falsity of said warranty.

3. That the judgment of the court below should have been for the claimant in the sum of $6,549.23, in addition to $795.63, a total of $7,344.86.

Argument.

Par. 33 Contains a Warranty.

The opinion of the court below says, rec. pp. 27, 28:

"If paragraph 33 stood alone in the contract for construction we believe the extract quoted should be regarded as a warranty as to the material backing the dam. It was a positive and material representation as to a condition presumably within the knowledge of the Government, and upon which, in the absence of any other provision or warning, the plaintiffs had a right to rely."

In support of this obviously correct position, the court cited *Atlantic Dredging Co.* v. *United States*, 35 C. Cls. 463, where the contract declared, p. 480:

"The material composing the shoals between D and E consists chiefly of sandy mud and a little gravel."

The court found the fact as follows, p. 465:

"In the course of such dredging, large quantities of stiff, sticky clay, of the character known as tenacious or hard, were found to underlie the mud and gravel upon D-E. The said shoals did not consist chiefly of sandy mud and a little gravel."

The court said of this, p. 480:

"The court is of opinion that the representation in the specification and embraced in the contract that 'the material composing the shoals between D and E consists

chiefly of sandy mud and a little gravel' is a warranty of the character of the material."

The present case is the same as that in the positive character of the warranty but it differs from it in a fact in favor of the claimants here, that they chose to complete their work.

In *Delafield* v. *Westfield*, 28 N. Y. Supp. 440, the syllabus, par. 1, says:

"At the end of the plans and specifications for proposed waterworks for defendant village was a note stating that the 'pipe line is mostly, and the tunnels are entirely, to be in soft, shale rock.' It appeared that plaintiff, whose bid for constructing the waterworks was accepted, relied in making his bid, on the representations as to the character of the excavations. *Held*, that such representations were part of the contract, and a warranty by defendant as to the quality of the excavations."

The court said, p. 443:

"While the exact route of the pipe line had not been located at the time bids were invited, the evidence tends to show that the plaintiff relied, in making his bid, upon the representation as to the character of the excavations, and assumed that it was as described in the defendant's specifications; and we think it must be held to be a part of the contract, and that it amounted to a warranty on the part of the defendant as to the quality of the excavation. It is a matter of common knowledge that in making contracts for such work the character of the material to be excavated is an important factor."

Upon appeal this view was affirmed; and it was further held that "because the excavations for the vitrified pipe line and the tunnels were in hard instead of shale rock, the plaintiff was excused for not completing his contract by the 1st of December, 1889." 41 N. Y. App. Div. 24, 28; affirmed by the Court of Appeals, 169 N. Y. 582.

The language of par. 33 is so positive a statement of a fact that the Court of Claims is plainly right in declaring it a warranty in itself.

Effect of Pars. 20 and 70.

But that court held that it was compelled "in the construction of this provision to take into account other provisions of the specifications, notably paragraphs 20 and 70," and in view of those paragraphs "the representation as to the condition back of the dam can not be regarded as a warranty," p. 28.

Appellants respond to this that the specific warranty of par. 33 is not to be annulled by any language found in pars. 20 and 70.

The bidders had before them specifications containing in two places (pars. 20 and 70, pp. 7–8, 16) general cautions requiring them to ascertain the conditions of the work, and in a third place (par. 33, pp. 9–10) a specific statement of the conditions to be found in the backing of the dam. This was under water, part of an existing government work, under the exclusive control of government officers, its condition peculiarly within their knowledge (par. 33, pp. 9–10; Finding IV, p. 22). Nothing in par. 20 requires this fact to be questioned. "The facilities and difficulties attending the execution of the proposed work including local conditions, uncertainty of weather and all other contingencies," which the bidders were there required to estimate, p. 8, can not be literally read to include a duty to investigate, or contradict a direct statement of, the condition of an existing government work two feet under water. Nor is anything in the general language of par. 70, directing the bidder to visit the site, the office of the lockmaster and of the local engineer, to ascertain the nature of the work and the general character of the river, sufficient to give notice

that the definite statement of the condition of the backing of the dam might be false. Their own sense of justice told them that the exact statement of this paragraph was not intended to be a pitfall for the unwary bidder, but the honest statement of an assured fact, peculiarly within the Government's knowledge.

Appellants assert:

(1) That, reading pars. 20, 33 and 70 together with an effort to reconcile their meaning, there is no essential inconsistency between them. Bidders might consistently accept in good faith the assurance of one particular fact stated in par. 33, and at the same time assume responsibility for investigating other facts not so certified.

(2) That, even if there is an inconsistency between these different portions of the same contract, they must be reconciled by construction in accordance with the well-settled legal maxim, *generalia specialibus non derogant*.

This maxim is interpreted by Kent, C. J., in *Munro* v. *Alaire*, 2 Caines, 327, as follows:

"If a general clause be followed by special words, which accord with the general clause, the deed shall be construed according to the special matter."

This was quoted with approval, and applied, by this court in *Bock* v. *Perkins*, 139 U. S. 628, 636. In that case an assignment for the benefit of creditors expressed a desire to make a "fair and equitable distribution of his property" and conveyed "all the lands and all the personal property of every name and nature whatsoever of the said party of the first part, more particularly enumerated and described in the schedule hereto annexed, marked Schedule A, or intended so to be." Schedule A did not include a stock of the goods constituting the bulk of the assignor's estate. This court held, p. 635, "that

the general words in the first part of the granting clause are limited by the particular description in the latter part of the same clause of the property actually conveyed to the assignee." The court says, p. 638, that numerous cases cited, supporting this principle, "rest upon sound rules of interpretation."

The same rule is ably declared in *Lauman* v. *Young*, 31 Pa. St. 306, as follows, p. 309:

"'It is a well-settled principle, unless there be a manifest intention to the contrary, that the general provisions in a contract are controlled by the special provisions therein;' Story on Cont., Sec. 641. 'If there be a recital of a particular claim, followed by general words of relief, the general words will be qualified and restricted by the particular recital;' *id*: Sec. 643, Platt on Cov., 379. This is a common case, for why particularize if the matter is to be controlled by a general principle? There is certainly no doubt about what was the intention of the parties thus far."

The reason for the rule is ably stated by the Supreme Court of Wisconsin in *Hoffman* v. *Eastern Wisconsin Railway Co.* 134 Wis. 603, as follows, p. 607:

"The rule contended for, that particularization followed by a general expression will ordinarily be restricted to the former, is based on the fact in human experience that usually the minds of parties are addressed specially to the particularization, and that generalities, though broad enough to comprehend other fields if they stood alone, are used in contemplation of that upon which the minds of the parties are centered."

Numerous cases illustrate the principle.

In *Richmond Ice Co.* v. *Crystal Ice Co.* 99 Va. 239, there was a covenant in a deed for the lessee "to keep the plant and buildings in repair during the term of this lease." Following this and separated only by a semi-

colon were the words "that it will replace at its own expense all glass broken during its tenancy," followed by other specific repairs to be made by the lessee. The court held that the lessee did not agree to keep the plant and buildings in repair generally but only to make the particular repairs specified, saying, p. 245:

"The meaning of all general words is restricted by more specific and particular descriptions of the subject to which they apply. To give the words 'to keep in repair' the comprehensive meaning contended for would be to treat the language immediately following as surplusage and exclude it from all consideration in determining the intention of the parties."

In *Newport Water Works* v. *Taylor*, 34 R. I. 478, a contract for furnishing water to the city of Newport required the contractor to "continuously supply said city of Newport with a full and ample quantity of fresh water to the reasonable satisfaction of said city for all the public uses of said city," specifying numerous details and ending, "and for all other public purposes." In a later portion of the contract he was required to furnish "water for fourteen spring drinking fountains of ordinary capacity and one constantly running or flowing fountain on Washington Square." It was claimed by the city that it had a right to add three other flowing fountains without extra payment, because of the general provisions of the contract. The court said, p. 488:

"The designation of this one fountain constitutes a limitation upon the contract for supplying water for a maximum price. It is a familiar rule, that in the construction of contracts, general terms are restricted and limited by particular recitals when used in connection with them."

In *Miller* v. *Wagenhauser*, 18 Mo. App. 11, a contract of dissolution of partnership recited that "said Hermann

Miller has assumed all debts and liabilities of the said firm" and he covenanted "to pay and discharge all debts of said firm as per the books thereof," and two other specified obligations. A judgment was obtained against the purchasing partner on a claim not appearing upon the books. The court held that this was not one of the debts assumed by him, saying, p. 15:

"The general terms of the preamble are restricted by the words of particular description which follow."

In *Scudder* v. *Perce*, 159 Cal. 429, a partnership agreement provided that, upon termination of the partnership, all property, including debts, should be divided between the partners, share and share alike, and that, if either party desired to terminate it at the end of one year, "after making the division hereinafter provided, the party of the first part should pay $1,000 and the party of the second part should transfer all his interests in the business and all gains of said business other than moneys and earnings collected." The plaintiff insisted upon one-half of the book accounts, beside the $1,000 thus fixed. The Supreme Court of California held that the last phrase literally limited the plaintiff to one-half of the moneys already collected and that all the moneys not collected belonged to defendant, reversing the two lower courts which had held that the general provision for an equal division controlled the specific provision. This was decided, on account of (p. 433) "the familiar rule that when general and specific provisions of a contract deal with the same subject-matter, the specific provisions, if inconsistent with the general provisions, are of controlling force."

In *City of New York* v. *American Railway Traffic Co.* 121 N. Y. Supp. 221, a contract for disposition of waste materials provided that the contractor "shall take all

necessary precaution and place proper guards for the prevention of accident," and shall so operate his machinery and appliances "that accidents shall be prevented." Various provisions followed to prevent accidents and the paragraph ended:

"* * * that said contractor shall be liable for all damages to person or to property arising from his negligence or that of his employees."

Plaintiff contended that by the first part of this provision the contractor was responsible whenever an accident occurred, without regard to negligence, but the court said, p. 222:

"We think that the general and comprehensive terms in the first part of the clause are limited by the latter portion, which restricts the contractors' liability to cases by negligence. The general part of the clause, which makes the contractor liable for accidents causing loss is necessarily restricted by the specific and particular statement that the contractor is liable for accidents caused by negligence."

This was affirmed by the Appellate Division without opinion, 128 N. Y. Supp. 1118.

The case differs materially from *Simpson* v. *United States*, 172 U. S. 372, cited by the court below, rec. p. 28. In that case, there was no description of the site of the work in the specifications. No reference was made in the specifications or in the contract to the borings made by the Government. The requirement to construct the dry dock was absolute. Reference is made in the opinion (p. 381) to the fact that there was no warranty by the United States "that the soil upon which the dock was to be constructed was to be of a particular nature conforming to a plan then existing"; also (p. 382) to the fact that in the specifications "there

is not contained a word implying that a particular piece of ground in the Navy Yard having soil of a specially stable character was to be the site on which the dock was to be placed."

The case comes much nearer to *United States* v. *Stage Company*, 199 U. S. 414. A contract for postal wagon service misstated the number of elevated railroad stations. This court, in the opinion by Mr. Justice Day, said (pp. 424, 425):

"It is true that the advertisement required the bidders to inform themselves as to the facts, and stated that additional compensation would not be allowed for mistakes; but, in the present instance, the Government in its advertisement had positively stated the number of stations at two. The contractor had a right to presume that the Government knew how many stations were to be served; it was a fact peculiarly within the knowledge of the Government agents and upon which, in the advertisement, it spoke with certainty. We do not think, when the statement was thus unequivocal, and the document was prepared for the guidance of bidders for Government service, that the general statement that the contractor must investigate for himself, and of non-responsibility for mistakes, would require an independent investigation of a fact which the Government had left in no doubt. We think the Court of Claims correctly allowed this item."

The case is analogous to *Horgan* v. *The Mayor*, 160 N. Y. 516. There "A contract for clearing and concreting the bottom of a park lake for the city of New York contained provisions that the contractor should drain off all water from the bottom during the progress of the work, that he should furnish all pumping or bailing required for the proper prosecution of the work, and that he should satisfy himself as to the nature and amount of the work to be done, by personal examination of the location. There was an outlet pipe in the bottom of the

lake, the gate of which only was visible on the contractor's personal examination of the proposed work, but on his attempting to draw off the water thereby in the progress of the work, the underground pipe or sewer proved to be obstructed and failed to remove the water for a considerable depth " (Syllabus, paragraph 2). The court said (p. 522):

" It was, of course, impossible when the plaintiff went upon the ground to examine the proposed work to see more than the outlet gate and the size thereof; whether the sewer lying beyond was in a condition to carry off the water was something that he could not ascertain by a mere inspection of the premises."

And again (pp. 522, 523):

" It seems to us a strained and unjust construction that would require the plaintiff under these provisions to remove, if necessary, the entire body of water from the pond. This latter work is a subject upon which the minds of the parties could not have met, and the plaintiff in his estimates did not consider that he was called upon to pump out this great body of water lying upon an area of six acres. It was proper for plaintiff to assume that the water of the lake could be discharged into the sewer through the outlet the city had constructed for that purpose."

In that, as in the pending case, the contractor was cautioned to satisfy himself of the nature of the work. In that case the existence of an outlet gate was treated as a binding representation to him that the lake could be drained through it. Here the contractor had a written warranty in the contract itself of the conditions in the backing of the dam. In that case the contractor recovered damages for breach of the implied warranty, notwithstanding the general caution; in this case he should *a fortiori* recover for breach of the express warranty.

No Assignment of Contract.

It was objected below that the contractors had, under Rev. Stat. Sec. 3737, forfeited all their rights by an assignment of the contract.

The facts on this subject are stated in Finding I, rec. pp. 21–22. The court below overruled this defense, rec. pp. 25–26, citing *Hobbs* v. *McLean*, 117 U. S. 567, where this court discussed fully the purpose and scope of this statute as follows, p. 575:

"Nor are the articles of partnership forbidden by Sec. 3737. They do not transfer the contract or any interest therein to the plaintiffs, and can not fairly be construed to do so. But if the articles of partnership were fairly open to two constructions, the presumption is that they were made in subordination to and not in violation of Sec. 3737; and if they can be construed consistently with the prohibitions of the section they should be so construed. For it is a rule of interpretation that, where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former must be adopted. Whart. on Ev., 2d ed., Sec. 1250; Best's Evidence, 6 Eng. Ed., 1st Am. Ed., Secs. 346, 347; *Shore* v. *Wilson*, 9 Cl. & F. 355, 397; *Moss* v. *Bainbrigge*, 18 Beav. 478; *Lorillard* v. *Clyde*, 86 N. Y. 384; *Mandal* v. *Mandal*, 28 La. Ann. 556. Interpreting the articles in the light of the statute, as it is the duty of the court to do, they were not intended to transfer, and do not transfer, to the plaintiffs any claim or demand legal or equitable against the United States, or any right to exact payment from the government by suit or otherwise. They may be fairly construed to be the personal contract of Peck, by which, in consideration of money to be advanced and services to be performed by the plaintiffs, he agreed to divide with them a fund which he expected to receive from the United States on a contract which he had not yet entered into. This is the plainly expressed meaning of the partnership contract, and it is only by a strained and forced construction that it can be

held to effect a transfer of Peck's contract with the United States and to be a violation of the statute.

"We are of opinion that the partnership contract was not opposed to the policy of the statute. The sections under consideration were passed for the protection of the government. *Goodman* v. *Niblack*, 102 U. S. 556. They were passed in order that the government might not be harassed by multiplying the number of persons with whom it had to deal, and might always know with whom it was dealing until the contract was completed and a settlement made. Their purpose was not to dictate to the contractor what he should do with the money received on his contract after the contract had been performed."

A case substantially the same as this was *Stout, Hall & Bangs* v. *United States*, 27 C. Cls. 385, where the Court of Claims said, p. 387:

"In all these facts, however, there is no evidence of an attempt to assign the contract. Plaintiffs adopted business methods which suited them in carrying out their engagements; they did not seek to avoid responsibility toward the Government or to place another contractor in their place. A contractor has a right to make subcontracts; in the nature of things he must make them, for he must hire labor, buy material, procure transportation, and fulfill, through the agency of others, the duties imposed upon him by his undertaking. He must not attempt to transfer his responsibility to the Government; the Government having selected him as the one with whom they wish to deal, he is not free to change that position. But he has a perfect right to fulfill his contract duties in the business manner which best pleases him, provided he retain his personal responsibility and achieve the required result."

This reasoning and authority clearly show that the Court of Claims was right in overruling this defense.

Conclusion.

It is respectfully submitted:

I. Par. 33 is a positive warranty that the dam was backed with broken stone, sawdust and sediment.

II. Pars. 20 and 70, being general, must be read subject to this special provision.

III. By reason of a breach of this warranty, the claimants suffered damages of $6,549.23, in addition to the amount of $795.63, found due by the Court of Claims.

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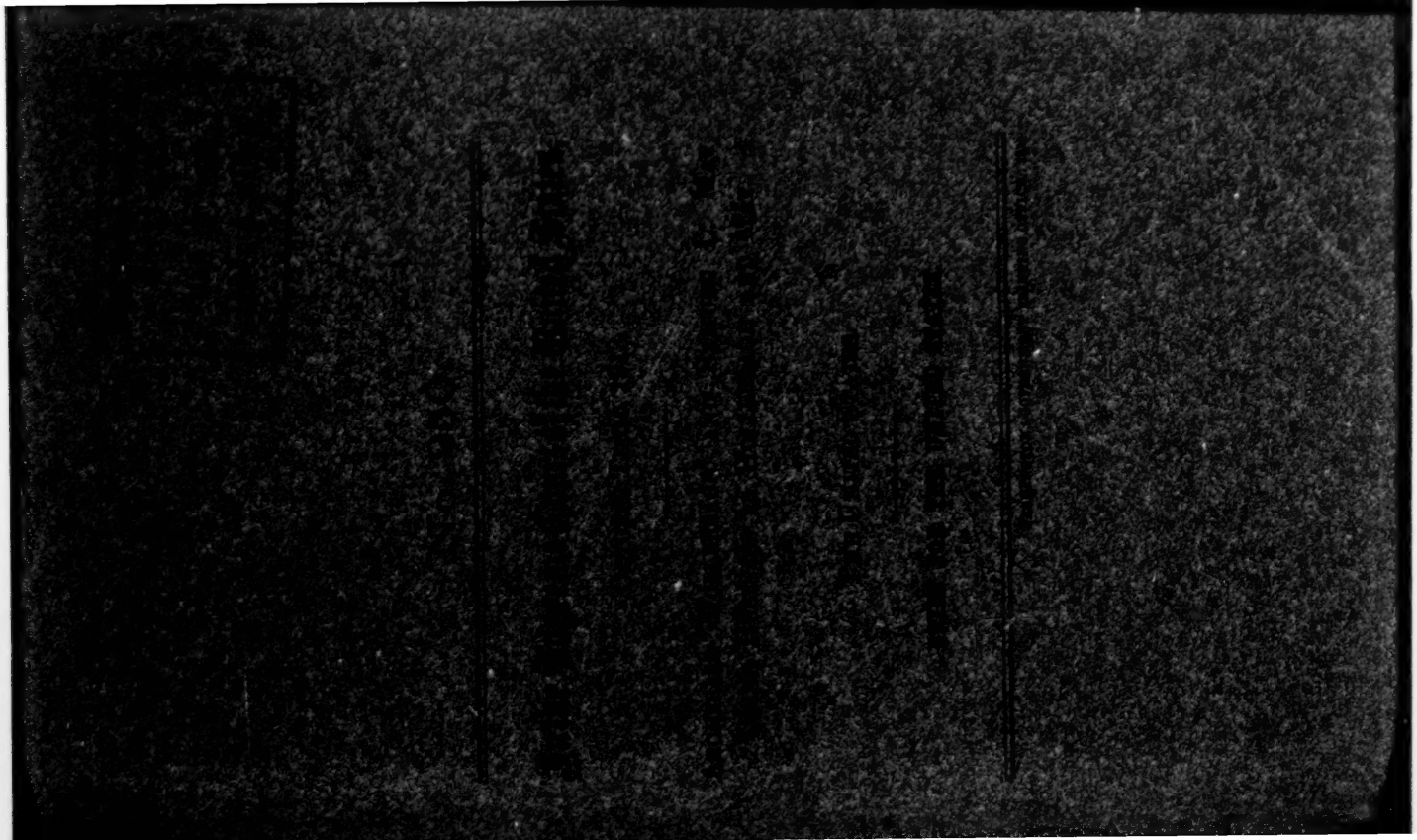

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TABLE OF CASES.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

ARCHIBALD HOLLERBACH AND SAMUEL L. May, doing business as Hollerbach and May, *v.* THE UNITED STATES.	No. 250.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT.

The claim herein is based upon a contract with the United States for the repair of Dam No. 1, Green River, Kentucky. The amended petition contained five items for damages claimed in the total sum of $10,004.90. (Rec., p. 5.) The question raised involves the construction of the following provisions of the specifications:

> Par. 20, Rec., pp. 7–8. It is understood and agreed that the quantities given are ap-

proximate only, and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders, or their authorized agents, are expected to examine the maps and drawings in this office, which are open to their inspection, to visit the locality of the work, and to make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies.

Par. 33, Rec., pp. 9–10. Work to be done. * * * The present dam, a wooden crib structure, is 528 feet long between abutments and about 52 feet wide at its base. The expected depth of concrete work is shown on the blue prints, but it may be made greater as the condition of the old timber may render it necessary. The work shall be carried out in sections, generally from 50 to 100 feet long, and no more of the old work shall be torn out than can be rebuilt in a few days in case of necessity. All the exterior surfaces of the concrete shall be faced with the facing described in paragraph 59, which shall be placed before the concrete below has set, and shall be smoothly finished off. *The dam is now* backed for about 50 feet with broken stone, sawdust, and sediment to a height of within 2 or 3 feet of the crest, and it is expected that a cofferdam can be constructed with this stone, after which it can be backed with sawdust

or other material. The excavation behind the dam will be required to go to the bottom, and it is thought that a slope of *1 horizontal to 1.2 vertical will give ample room.*

Par. 60, Rec., p. 15. Blue prints. Blueprint drawings showing the method of construction may be seen at this office; they shall form a part of these specifications and shall not be departed from except as may be found necessary by the condition of the old timber encountered.

Par. 70, Rec., p. 16. Investigation. It is expected that each bidder will visit the site of this work, the office of the lock master, and the office of the local engineer and ascertain the nature of the work, the general character of the river as to floods and low water, and obtain the information necessary to enable him to make an intelligent proposal.

The Court of Claims found in part—

1. That the dam was not backed with broken stone, sawdust, and sediment, as stated in paragraph 33 of the specifications. (Findings II, Rec., p. 22.)

2. That as a result of said condition in the backing of the dam the cost of the work in question to the appellants was materially increased. (Findings IV and V, Rec., p. 23; Findings VII and VIII, Rec., pp. 24, 25.)

3. That the representation contained in paragraph 33 of the specifications must be considered in connection with the provisions contained in para-

graphs 20 and 70, and when so considered *does not constitute a warranty.* It was also decided by the court that when delay was caused by conditions other than those represented in the contract the representation did not excuse the contractor unless it amounted to a warranty, and in this case, there being no warranty, appellants were liable for, and the Government was justified in, deducting the amount of damage sustained by reason of the cost of inspection and superintendence during the period of delay, which the court found to be $320.

The court entered judgment for claimants in the total sum of $795.63. It found that appellants had been put to an additional expense of $6,549.23 over and above the said judgment, for which they have not been reimbursed. The court refused to enter judgment for this additional amount, because the contract contained no warranty which would require the Government to pay the same.

APPELLANTS' POSITION.

Appellants contend that paragraph 33 contains an express warranty not affected by the provisions of paragraphs 20 and 70.

APPELLEE'S POSITION.

Appellee insists that paragraph 33 must be considered in connection with paragraphs 20 and 70, and when so considered contains no warranty.

II.

ARGUMENT.

Paragraph 33 is modified by paragraphs 20 and 70 and contains no warranty.

The Government grounds its defense on the principle, so frequently announced by this court, that in interpreting a contract the court shall consider all of the provisions therein; the relations of the parties; their connection with the subject matter, and the circumstances under which the contract was executed.

On the other hand, appellants have selected a part of a clause in one of the provisions, and by contending that it should be read alone assert that this part of a clause contains a warranty binding the Government to pay the damages alleged to have been suffered by appellants. This clause is as follows:

> The dam is now backed for about 50 feet with broken stone, sawdust, and sediment to a height of within 2 or 3 feet of the crest.

In order to maintain this proposition it must appear that the extract above quoted is not modified by any other provision of the contract. That this is not the case clearly appears from paragraphs 20 and 70. In paragraph 20 there are two important provisions:

> (1) It is understood and agreed that the quantities given are approximate only, and

> and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same.
>
> (2) Bidders, or their authorized agents, are expected * * * to visit the locality of the work, and to make their own estimates of the facilities and difficulties attending the execution of the proposed contract, etc.

If these provisions mean anything they mean that bidders were to make their own estimates as to the cost of the work; that in arriving at their conclusions they were to take into consideration "the difficulties attending the execution of the proposed contract." This being true, the difficulties that might be encountered and the probable cost of the work could not be estimated by a superficial investigation. The evidence established the fact that the appellants were men of experience in work of this nature and they knew that the conditions beneath the surface could be ascertained by methods well known to the trade. They were cautioned by the terms of the contract as to this matter, and if they failed to take notice it was at their peril.

In paragraph 70 appears the following provision:

> It is expected that *each* bidder will visit the site of this work * * * and ascertain the nature of the work, the general character of the river as to floods and low water, and *obtain the information necessary to enable him to make an intelligent proposal.* (Italics ours.)

Here, again, bidders are admonished to make their own independent investigation. It will not do to say that this admonition was limited, as counsel insists, to observations of the character of the river, floods, etc., *for each bidder* was individually and specifically enjoined to "*obtain the information necessary to enable him to make an intelligent proposal.*"

It can not be contended that merely visiting the site and observing the general character of the river as to floods and low water would alone enable a bidder to make an intelligent bid. He was charged with the necessity of doing much more than that, for he was to obtain the information necessary to enable him to make an intelligent proposal. He was expected to ascertain the *nature* of the work. This certainly was notice that the bidder was to make all necessary investigation to enable him to bid intelligently for the work.

The Government freely gave bidders what information it had regarding the backing of the dam, but that was all. This was gratis and not a guarantee.

It was understood and agreed that the quantities given were *approximate only* and that no claims should be made against the United States on account of any excess or deficiency, absolute or relative.

In view of these provisions, it can be said that the extract from paragraph 33, relied upon by appellants, is not modified? Can it be contended with any degree of reason that the parties at the time

understood that the sentence referred to should be construed independently of all other provisions of the contract? The answer to each of these questions, we submit, must be in the negative.

If, then, we construe the contract as a whole, the court was not only warranted but compelled to hold that the condition of the backing of the dam was not peculiarly and only within the knowledge of the Government, but was a subject about which the appellants were expected to inform themselves, and that "the representation as to the condition back of the dam can not be regarded as a warranty." * * *

Smith & Benham v. *Curran & Hussey* (138 Fed., 150).

Shappirio v. *Goldberg* (192 U. S., 232).

Huse v. *United States* (44 C. Cls., 19–32; 222 U. S., 496).

Burgwyn v. *United States* (34 C. Cls., 348).

Lewman et al. v. *United States* (41 C. Cls., 470).

Griefen v. *United States* (43 C. Cls., 107).

Simpson & Co. v. *United States* (172 U. S., 372; 3 C. Cls., 217).

Cases quoted from by appellants to support their contention that they were warranted in relying upon representation of Government in provision 33 distinguished from case at bar.

The case largely relied upon by appellants as decisive of the question here involved is the *Atlantic Dredging Company* v. *The United States*

(35 Ct. Cls., 463). In that case, however, the representation made was clear and unmistakable. There was *no provision* in the contract *modifying or qualifying* in the least the representation as to the material to be dredged. The contract contained no cautionary provision of any kind. The case is, therefore, distinguishable from the case at bar and can not be regarded as an authority in this case.

The case of *Delafield* v. *Village of Westfield* (28 N. Y. Supp., 440; affirmed by the Court of Appeals, 169 N. Y., 582) is not an authority in this case for the same reason that the Atlantic Dredging Company case is not an authority, namely, the representation in question was not qualified in any way by other provisions of the contract.

Counsel also rely upon *United States* v. *Stage Company* (199 U. S., 414). In that case the contract for postal wagon service misstated the number of elevated railroad stations. The character of the representation in that case was very different from this case. In the Stage Company case the advertisement for proposals represented that there were *two* stations on an elevated railway. In fact there were *four* stations, requiring double the service. The contractor made no investigation prior to signing the contract, but relied upon the representations contained in the advertisement. In that case it was definitely and unequivocally stated that there were two stations to be served, no more, no less. There was no room for doubt. *There were no words, phrases, or sentences in any*

way inconsistent with the meaning of the word "two"; there was nothing to suggest to the bidder that an investigation should be made to ascertain the number of stations there were.

It is submitted that no analogy whatever exists between the two cases.

The last case referred to by counsel in support of their proposition (brief, pp. 12–13) is *Horgan* v. *The Mayor* (160 N. Y., 516). This case involved the construction of a contract for clearing a concrete bottom of a lake in Central Park, New York City. By the terms of the contract the plaintiff was required to provide all labor and materials required *for conducting the flow of water* through or across the area of the pond *to the outlet*, or for drawing water from any portion thereof, and all pumping or bailing required for the proper prosecution of the work. It was also provided that he should satisfy himself as to the nature and amount of the work to be done by a personal examination of the location. The pond had an outlet consisting of a circular gate resting on the bottom and connected by a pipe with one of the city sewers. The gate, but not the pipe, was visible to the contractor at the time he made examination of the proposed work. Shortly after the contract was executed the contractor attempted to draw off the water through the outlet, and the gate was opened for that purpose. After a portion of the water had been drawn off the pipe ceased to work. An examination disclosed that the pipe or sewer was seriously ob-

structed and that no further water could be drawn from the pond.

The engineer on behalf of the city insisted that it was the duty of the contractor to pump the water out. The contractor contended that he was not required to remove from the 6-acre pond by pumping any portion of the water that would naturally flow through the outlet pipe, which had been placed there for that purpose, if it were in order; that his duty was merely to conduct across the pond to the outlet the water, and to do such pumping as was necessary to keep the bottom of the pond clear of water while the work of laying the concrete was in progress.

In deciding the case the court said (p. 522):

> A fair construction of the contract on this point authorized the contractor to assume that the pond could be drained of water in a general sense. There would, of course, be inadequacies and irregularities on the bottom where more or less water would remain and which the contractor was bound to pump out and keep clear during the progress of laying the concrete work.
>
> A careful reading of those portions of the specifications above quoted shows that the plaintiff was to drain off "all the water from the bottom during the prosecution of the work," to furnish "all labor and materials required for conducting the flow of water through or across the area of the pond or any portion thereof, and all pumping or bailing or other work required"; and also

> " all labor and materials required for conducting the flow of water through or across the area of the pond *to the outlet*, or for drawing water from any portion of the area, and all pumping or bailing required for the proper prosecution of the work during its progress and until its completion." These quotations disclose the language of limitation and show the contract did not contemplate the contractor pumping out the water of the lake in a general sense.

Then follows the last paragraph quoted by appellants (p. 13). The opinion continues (pp. 522–523):

> It was proper for plaintiff to assume that the water of the lake could be discharged into the sewer through the outlet the city had constructed for that purpose.

It requires no comment to show conclusively that this case fails absolutely to support the position of appellants, for after all the case was decided in accordance with the rule of interpretation for which we contend, as appears from the following paragraph (p. 523):

> This construction of the contract falls within a familiar rule: " The meaning of a contract is to be gathered from a consideration of all its provisions and the inferences naturally derived therefrom as to the intent and object of the parties in making it, and the result which they intended to accomplish by its performance." (*Mansfield* v. *N. Y. C. & H. R. R. R. Co.*, 102 N. Y., 211; *Booth* v. *Cleveland Mill Co.*, 74 N. Y., 15–21.)

The rule as to general provisions being limited by special words considered.

It is contended by the Government that the doctrine espoused by appellants, namely, that general clauses followed by special words are limited by those special words, must give way to the general doctrine that the meaning of a contract must be interpreted from the whole instrument.

It is settled beyond controversy that effect must be given, if possible, to every part of a contract, and it is only when there is an inconsistency or repugnance which is totally irreconcilable that a discrimination will be made as to which part will be made to yield to the other.

That in this case there is no such inconsistency is too plain for argument. The various provisions of the contract under the construction of the court below gives force and effect to all the words, clauses, and sentences contained therein and makes the contract a consistent whole.

Page on Contracts, sec. 1113.
Elliott on Contracts, sec. 3665.
Sutherland on Statutory Construction, sec. 279.

The following authorities cited by appellants uphold the Government's contention that the contract must be considered as a whole.

The principle for which we contend is supported by authorities cited by appellants. By way of illustration we refer to the following cases: The case of *Hoffman* v. *Eastern Wis. R. & L. Co.* (134

Wis., 603) was an action for personal injuries received in a collision. Prior to the filing of the suit the plaintiff had given a release to the defendant on account of injuries, "being right limb contusion, head struck, shook up badly, and * * * otherwise bruised and injured." Subsequently as a result, it is said, of the injuries, it became necessary for the plaintiff to undergo a serious operation. In the court below the plaintiff recovered judgment. On appeal counsel for respondent, in discussing the release (p. 611), said:

> This is a release of the damages for injuries enumerated and the general words are limited to the particular injuries described in the release.

In reversing the case, the court in its opinion (p. 606), said:

> The trial court evidently felt constrained in his construction of the release in this case by what he termed a strict rule of law applicable thereto, to the effect that the general words of the release, acknowledging full payment and satisfaction of all claims by reason of the injuries received on defendant's car on the date named, were limited by the specification of those injuries elsewhere in the writing, and counsel now contend that there is such a strict rule of law which must constrain us, to the effect that wherever words of particular description are contained in any contract, and more particularly in a release of damages, followed

by more general words of discharge, the instrument must be construed as limited to the particular words and not extended to the full scope of the general words thereof. There is an entirely erroneous idea embodied in this contention. No rule of construction merely is a strict rule of law. In applying and enforcing any and every contract, especially when reduced to writing, it is the duty of the court to ascertain what the parties really intended by the words used in the instrument; and so-called rules of construction are but aids or suggestions resulting from common experience, to the effect that people generally, in arranging and using words, mean thus and so thereby. *In re Howes's Estate*, 103 Wis., 497, 79 N. W., 786; *Brittingham & H. L. Co. v. Manson*, 108 Wis., 221, 225, 84 N. W., 183.

Then follows the quotation found in appellant's brief (p. 8) as to the rule for which respondent contended, and in the same paragraph (but not quoted by counsel) are the following words (p. 607):

> *It is the foundation of the whole rule* nascitur a socio; *but if the contrary appear to have been the intent, courts will defeat instead of execute the real contract of the parties on blind submission to any such rule.*

In *Richmond Ice Company v. Crystal Ice Company* (99 Va., 229), also cited by appellants, the court said (p. 245):

> In the interpretation of written contracts every part of the contract must be made, if

possible, to take effect, and every word of it must be made to operate in some shape or other.

In *Bock* v. *Perkins* (139 U. S., 628), relied upon by appellants under the facts stated, there can be no doubt as to the justice of the decision. After a full consideration of the case the court said (p. 635):

> The assignment is to be determined by the general rules governing the interpretation of written instruments, the controlling one of which is that effect must be given to the intention of the parties as disclosed by the instrument to be considered.

Again (p. 637):

> But we are to take the whole instrument into consideration in order to ascertain the true intent and meaning of the parties.

The following authorities cited by appellants are distinguishable from case at bar.

In *Newport Water Works* v. *Taylor* (34 R. I., 478), to which reference is made in appellant's brief (pp. 8, 9), material facts are omitted. The facts are fairly stated in the syllabus (p. 479):

> A contract between a city and a water company provided that the company should furnish the city with water for its use for the public buildings and many specified purposes, including "fourteen spring drinking fountains of ordinary capacity, and one constantly running fountain on Washington Square," at an agreed price, and that water in addition to what was designated should be

allowed at stipulated rates, including among other purposes, "spring fountains of the kind above mentioned, at $25 a year each." Said rates were to continue until the price to be paid by the city should be equal to $10,000 a year in all, and then the city was to pay only at said last-mentioned rate, and all additional or greater use of the water should be free. "Said fountain on Washington Square shall be of capacity of at least equal to that of the fountain now in operation there. The other fountains shall be located by said city at its pleasure."

The city council passed a resolution authorizing the erection of three fountains similar to that on Washington Square, and for several years the city paid for their use at the rate of $100 a year each, in addition to the sum of $10,000, and after a period of four years, during which no payment was made for the fountains, upon claim made therefor by the water company, appropriated the amount necessary for the payment of such claim.

In passing upon the case the court said (p. 488):

Applying the rules of construction stated above, it seems clear, that looking to the *contract as a whole* it was not the intent of the parties to include under the maximum price of $10,000 any constantly flowing fountain other than the one particularly specified.

And again (pp. 490, 491):

We are of the opinion that upon the terms of the contract, considered with reference to

> the situation and circumstances of the parties at the time of the execution thereof, and in the light of the *construction given to the contract by the conduct of the parties* since the same went into operation, only one constantly flowing fountain was contemplated by the contract as included under the maximum price of $10,000 fixed in said contract for supplying water to the city of Newport.

It is clear, we submit, that in the decision of this case the court was controlled by considering the contract as a whole and giving due weight to the *practical interpretation of the contract by the parties.*

In *Scudder* v. *Perce* (159 Cal., 429), cited by appellants (brief, p. 10), the pertinent facts are: A partnership agreement provided that upon termination of the partnership all property and debts should be divided between the partners, share and share alike. The contract contained the following provision (p. 431):

> * * * It being distinctly understood that at the expiration of said one year, as aforesaid, in case either of the parties hereto decide to terminate, and after making the division hereinbefore provided, that the party of the first part will pay to the party of the second part the sum of one thousand ($1,000) dollars; and the party of the second part shall thereupon transfer and assign to the party of the first part all his interest in and to all the office and laboratory furniture and

> fixtures and in the good will of said business and in all gains of said business *other than moneys earned and collected.*

On the dissolution of the partnership, the plaintiff, the retiring partner, insisted on one-half of the book accounts in addition to the $1,000. The controversy arose over the meaning of the language above quoted, and in particular over the meaning of the words italicized. After reviewing the arguments of counsel as to the construction of the words referred to, the court said even if it be conceded, up to that point, that the arguments were of equal weight there were certain other considerations to be adverted to to give determinate force to the construction of the contract. The court stated two rules applicable, one of which appears in appellants' brief; the other does not. They are (p. 433):

> The first of these is the familiar rule that when general and specific provisions of a contract deal with the same subject matter, the specific provisions, if inconsistent with the general provisions, are of controlling force.

And—

> The second consideration is that all parts of a contract are to be given effect if this may be done without doing violence to the manifest expressed intent of the parties, and that the terms of a contract are to be construed according to the ordinary and usual acceptation of the language unless an intent

> that they should be construed otherwise plainly appears. Appellant's construction of the contract gives to the italicized language the meaning which it naturally and ordinarily bears. The respondent's construction, on the other hand, is a distinct change in the meaning of the contract and amounts to a judicial reformation of it, by which reformation it would be made to say that there should be excepted from the transfer all moneys earned and *not collected,* when the contract itself declares that there shall be excepted from the contract only the moneys earned and actually collected.

There is no conflict between the two cases.

The same is true of *City of New York* v. *American Railway Traffic Company* (121 N. Y. supp., 222), *Miller* v. *Wagenhauser* (18 Mo. Ap., 11), *Lauman* v. *Young* (31 Pa. St., 306).

The principle applicable in this case and for which we contend has been consistently upheld by the courts, as appears from the authorities to which we have directed attention.

See also *United States* v. *Mescall* (215 U. S., 26) for construction placed upon the rule of *ejusdem generis,* involving the same general principle, and *Lindeke et al.* v. *Associate Realty Company* (146 Fed., 630), and cases there cited.

CONCLUSION.

We respectfully submit, therefore, by way of conclusion, that the judgment of the lower court, in

holding that paragraph 33 of the specifications contained no warranty, and in dismissing the petition as to all items set forth in findings other than III and VII, should be affirmed.

HUSTON THOMPSON,
Assistant Attorney General.

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HOLLERBACH *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 250. Argued March 9, 1914.—Decided April 6, 1914.

A Government contract should be interpreted as are contracts between individuals and with a view of ascertaining the intention of the parties and to give it effect accordingly if that can be done consistently with its terms.

A positive statement in a contract as to present conditions of the work must be taken as true and binding upon the Government, and loss resulting from a mistaken representation of an essential condition should fall upon it rather than on the contractor, even though there are provisions in other paragraphs of the contract requiring the contractor to make independent investigation of facts.

47 Ct. Cls. 236, reversed.

THE facts, which involve the construction of a Government contract for public work and the rights of the contractor thereunder, are stated in the opinion.

Mr. William B. King, with whom *Mr. George A. King* and *Mr. William E. Harvey* were on the brief, for appellants:

Paragraph 33 contains a warranty. This was admitted by the Court of Claims and is supported by authority.

As to the effect of pars. 20 and 70, there is no real contradiction and the special provisions control the general ones. There was no assignment of contract.

In support of these contentions, see *Atlantic Dredging Co.* v. *United States*, 35 Ct. Cls. 463; *Bock* v. *Perkins*, 139 U. S. 628; *New York* v. *Am. Traffic Co.*, 121 N. Y. Supp. 221; *Delafield* v. *Westfield*, 41 N. Y. App. Div. 24; *S. C.*, 169 N. Y. 582; *Hobbs* v. *McLean*, 117 U. S. 567; *Hoffman* v. *Eastern Wis. R. Co.*, 134 Wisconsin, 603; *Horgan* v. *The Mayor*, 160 N. Y. 516; *Lauman* v. *Young*, 31 Pa. St. 306;

Miller v. *Wagenhauser*, 18 Mo. App. 11; *Munro* v. *Alaire*, 2 Caines, 327; *Newport Water Works* v. *Taylor*, 34 R. I. 478; *Richmond Ice Co.* v. *Crystal Ice Co.*, 99 Virginia, 239; *Scudder* v. *Perce*, 159 California, 429; *Simpson* v. *United States*, 172 U. S. 372; *Stout* v. *United States*, 27 Ct. Cls. 385; *United States* v. *Stage Co.*, 199 U. S. 414.

Mr. Assistant Attorney General Thompson for the United States, submitted:

Paragraph 33 is modified by paragraphs 20 and 70 and contains no warranty.

Cases quoted from by appellants to support their contention that they were warranted in relying upon representation of Government in provision 33 can be distinguished from case at bar.

The rule as to general provisions being limited by special words does not apply to this case.

The contract must be considered as a whole and the authorities cited by appellants are distinguishable from this case. See *Atlantic Dredging Co.* v. *United States*, 35 Ct. Cls. 463; *Bock* v. *Perkins*, 139 U. S. 628; *Burgwyn* v. *United States*, 34 Ct. Cls. 348; *Delafield* v. *Westfield*, 28 N. Y. Supp. 440; *S. C.*, 169 N. Y. 582; Elliott on Contracts, § 3665; *Grieffen* v. *United States*, 43 Ct. Cls. 107; *Horgan* v. *Mayor*, 160 N. Y. 516; *Hoffman* v. *Eastern Wisconsin R. R. Co.*, 134 Wisconsin, 603; *Huse* v. *United States*, 44 Ct. Cls. 19, 32; *S. C.*, 222 U. S. 496; *Lewman* v. *United States*, 41 Ct. Cls. 486; *Lindeke* v. *Associate Realty Co.*, 146 Fed. Rep. 630; *Newport Water Works* v. *Taylor*, 34 R. I. 478; Page on Contracts, § 1113; *Richmond Ice Co.* v. *Crystal Ice Co.*, 99 Virginia, 239; *Scudder* v. *Perce*, 159 California, 429; *Shappirio* v. *Goldberg*, 192 U. S. 232; *Simpson* v. *United States*, 172 U. S. 372; *S. C.*, 31 Ct. Cls. 217; *Smith* v. *Curran*, 138 Fed. Rep. 150; Sutherland on Stat. Const., § 279; *United States* v. *Stage Co.*, 199 U. S. 414; *United States* v. *Mescall*, 215 U. S. 26.

MR. JUSTICE DAY delivered the opinion of the court.

This suit was brought to recover upon a contract between the appellants, doing business as Hollerbach & May, and the United States for the repair of Dam No. 1, Green River, Kentucky. In the aspect in which it is now presented the question involved concerns the right of the claimants to recover because of certain damages alleged to have been suffered by them which would not have accrued had the dam been backed with broken stone, sawdust and sediment, as was stated in paragraph 33 of the specifications attached to the contract.

The determination of this controversy requires reference to certain parts of the contract and the findings of the Court of Claims. The specifications provide, among other things:

"20. It is understood and agreed that the quantities given are approximate only, and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders, or their authorized agents, are expected to examine the maps and drawings in this office, which are open to their inspection, to visit the locality of the work, and to make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies.

* * * * * * * *

"33. Work to be done. . . . The present dam, a wooden crib structure, is 528 feet long between abutments and about 52 feet wide at its base. The expected depth of concrete work is shown on the blue prints, but it may be made greater, as the condition of the old timber may render it necessary. The work shall be carried out in sections, generally from 50 to 100 feet long, and no more of the old work shall be torn out than can be rebuilt in a few days in

case of necessity. All the exterior surfaces of the concrete shall be faced with the facing described in paragraph 59, which shall be placed before the concrete below has set, and shall be smoothly finished off. The dam is now backed for about 50 feet with broken stone, sawdust, and sediment to a height of within 2 or 3 feet of the crest, and it is expected that a cofferdam can be constructed with this stone, after which it can be backed with sawdust or other material. The excavation behind the dam will be required to go to the bottom, and it is thought that a slope of 1 horizontal to 1.2 vertical will give ample room.

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"60. Blueprints. Blueprint drawings showing the method of construction may be seen at this office; they shall form a part of these specifications and shall not be departed from except as may be found necessary by the condition of the old timber encountered.

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"70. Investigation. It is expected that each bidder will visit the site of this work, the office of the lockmaster, and the office of the local engineer and ascertain the nature of the work, the general character of the river as to floods and low water, and obtain the information necessary to enable him to make an intelligent proposal."

The Court of Claims found as a matter of fact, among other things:

"As the contractors proceeded with the work of removing the material behind the dam it was found that said dam was not backed with broken stone, sawdust, and sediment as stated in paragraph 33 of the specifications, but that said backing was composed of a soft slushy sediment from a height of about 2 feet from the crest to an average depth of 7 feet, and below that to the bottom of the required excavation said dam was backed by cribwork of an average height of 4.3 feet consisting of sound logs filled with stones." (47 Ct. Cls. p. 238.)

The Court of Claims refused to enter judgment for the damages suffered by reason of the difference in the backing of the dam as found by the court, but estimated the damages for the matters in dispute in that respect to aggregate $6,549.23 (47 Ct. Cls. 236).

In the course of its opinion the court below said that if paragraph 33 stood alone it would be a warranty of the material backing the dam. "It was," said the court, "a positive and material representation as to a condition presumably within the knowledge of the Government, and upon which, in the absence of any other provision or warranty the plaintiffs had a right to rely." But the court held that the cautionary provisions of paragraphs 20 and 70 required the claimants to inform themselves of the condition of the backing of the dam and that when those paragraphs were read with paragraph 33 the statements and representations of the last named paragraph could not be regarded as a warranty upon which the claimants had the right to rely, and the court reached this conclusion upon the authority of certain cases of its own and *Simpson* v. *United States*, 172 U. S. 372.

In *Simpson* v. *United States*, *supra*, suit was brought upon a contract for the construction of a dry dock at the Brooklyn Navy Yard. It was discovered that the foundations upon which the dry dock rested contained quicksands which were unknown and which were not shown in the drawings and plans inspected by the contractors before the making of the contract and upon the strength of which the contractors had made their bid. This court held that the written contract merged all previous negotiations and must be presumed in law to express the final understanding of the parties. Of the contract itself the court said that it was clear that there was nothing in its terms which supported, even by remote implication, the premise upon which the claimants rested their right of recovery; that the contract contained no statement or

agreement or even intimation of a warranty, express or implied, concerning the character of the underlying soil at the place where the dock was to be built; that the only word in the contract which supported the contention of warranty was that the dock was to be built in the navy yard upon a site which was "available," and that the word "available" did not warrant against the quicksands which were found, and it certainly did appear that the site was available for the dock was constructed upon it. It is therefore apparent that this case is entirely different from the one now under consideration, in the contents of the contract and specifications made part thereof, and that in the *Simpson Case* the claimants relied upon previous negotiations and information as to the site for the dock, developed in the plans showing the result of an examination made by Government officers upon a portion of the yard, and did not depend, as here, upon the terms of the contract.

In this case the claimants rely upon the contract, read in the light of the findings of the Court of Claims. Turning to paragraphs 20 and 70 the Court of Claims justified its conclusion in that part of paragraph 20 which provides that "quantities given are approximate only, and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders, or their authorized agents, are expected . . . to visit the locality of the work, and to make their own estimates," etc.; and in that part of paragraph 70 which reads, "it is expected that each bidder will visit the site of this work, . . . and ascertain the nature of the work," etc. The term "quantities" as used in paragraph 20 may doubtless refer to estimates of the amount of different kinds of work which are specified in the contract. We do not see how it could control the statement of paragraph 33, definitely made, as to the character of the material back of the dam. Pertinent parts of the paragraphs

referred to would seem to be those which required bidders or their authorized agents to investigate for themselves and to visit the locality of the work to ascertain its nature and make their own estimates thereof. The specifications attached to the contract set forth the work to be performed in great detail, as to its nature and character, and many particulars as to manner and extent of the work to be done, the removal of old timber and material, etc., the general character of the river as to floods and low water, etc., and the difficulties attending the execution of the contract, and as to all these things the bidder was required by paragraphs 20 and 70 to make examination for himself and at his own peril.

In paragraph 33 the Government sets forth with particularity a description of the old dam, its length and width, and it was there added: "The dam is now backed for about 50 feet with broken stone, sawdust and sediment to a height of within 2 or 3 feet of the crest," etc. The specifications provided that the excavations behind the dam must be to the bottom. In the light of this specification, turn to the finding of fact, and we learn that the claimants, as they proceeded with the work, found that the dam "was not backed with broken stone, sawdust and sediment as stated in paragraph 33 of the specifications," and below seven feet from the top to the bottom there was a backing of cribbing of an average height of 4.3 feet of sound logs filled with stone. Obviously, this made it much more expensive to do the work than if the representation inserted by the Government in the specifications of its own preparation had been true and only the character of material had been found which the specification unequivocally asserted was there.

A Government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms

of the instrument. In paragraph 33 the specifications spoke with certainty as to a part of the conditions to be encountered by the claimants. True the claimants might have penetrated the seven feet of soft slushy sediment by means which would have discovered the log crib work filled with stones which was concealed below, but the specifications assured them of the character of the material, a matter concerning which the Government might be presumed to speak with knowledge and authority. We think this positive statement of the specifications must be taken as true and binding upon the Government, and that upon it rather than upon the claimants must fall the loss resulting from such mistaken representations. We think it would be going quite too far to interpret the general language of the other paragraphs as requiring independent investigation of facts which the specifications furnished by the Government as a basis of the contract left in no doubt. If the Government wished to leave the matter open to the independent investigation of the claimants it might easily have omitted the specification as to the character of the filling back of the dam. In its positive assertion of the nature of this much of the work it made a representation upon which the claimants had a right to rely without an investigation to prove its falsity. See *United States* v. *Stage Co.*, 199 U. S. 414, 424.

It follows that the judgment of the Court of Claims must be reversed and the case remanded to that court with directions to enter judgment for the claimants for the damages incurred because of the different character of material found behind the dam than that described in the specifications.

Reversed.